# SUPREME COURT OF THE UNITED STATES.

## No. 3 Original.

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**EX PARTE: ALEXANDER FLEMING, IN THE MATTER OF SOUTTER ET AL., SURVIVORS, &c.,**

**vs.**

**THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY AND OTHERS.**

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**MOTION FOR MANDAMUS TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.**

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GOVERNMENT PRINTING OFFICE.

July 25th 1865

Denver

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in

1 To the justices of the Supreme Court of the United States of America:

Your petitioner, Alexander Fleming, a citizen of the State of New York, respectfully showeth:

That on the 31 day of December, A. D. 1856, the La Crosse and Milwaukee Railroad Company, then a corporation existing under the laws of the State of Wisconsin, made, executed, and delivered to Greene C. Bronson, James T. Soutter, and Shepherd Knapp, as trustees, a certain mortgage or trust deed (a copy of which is hereto attached and marked "Exhibit No. 1") to secure certain bonds therein mentioned, and that said company sold and assigned all, or nearly all, said bonds to bona fide purchasers.

That afterwards, on the 5th day of December, A. D. 1859, the said trustees exhibited in the district court of the United States for the district of Wisconsin, in equity, their bill of complaint against said company and others, defendants, to foreclose said mortgages, by sale of the mortgaged premises described in and conveyed by said mortgage, a copy of which said bill of complaint is hereto attached and marked "Exhibit No. 2."

2 That thereupon such proceedings were had in said district court that subpœna was duly issued and served, and the said district court acquired and had jurisdiction of the parties to said bill of complaint and the subject matter thereof.

That thereupon such further proceedings were had in said cause in said court that on the 11th day of March, A. D. 1861, the said district court made an order of reference in said cause, a copy of which order is hereto attached and marked "Exhibit No. 3."

That the said master and special masters in said order of reference mentioned, afterwards, on the 7th day of October, A. D. 1861, made their report to said district court, a copy of which report is hereto attached and marked "Exhibit No. 4."

That afterwards, to wit, on the 31 day of October, A. D. 1861, Selah Chamberlain, one of the defendants, made and filed exceptions to the said report, a copy of which exceptions is hereto attached and marked "Exhibit No 5."

That said district court, on the 7th day of January, A. D. 1862, made an order in said cause, a copy of which order is hereto attached and marked "Exhibit No. 6," and that said district court never thereafter made

3 any other or further order in relation to the said Chamberlain's said exceptions.

That afterwards, on the 13th day of January, A. D. 1862, the said district court passed and rendered a final decree of foreclosure and sale in said cause, a copy of which decree is hereto attached and marked "Exhibit No. 7."

That the marshal of the United States for the district of Wisconsin advertised the mortgaged premises and other things for sale on the 2d day of October, A. D. 1862, in pretended pursuance of said decree, and on the day and year last aforesaid sold the same at public vendue as follows: The lands granted by Congress to Isaac Seymour, Frederick P. James, and N. A. Cowdry, for one hundred thousand dollars, and the railroad, rolling stock, and franchises and other things to the same purchasers for the sum of seventeen hundred thousand dollars; and afterwards, on the 6th day of October, A. D. 1862, the said marshal reported said sale to the circuit court of the United States for the district of Wisconsin, to which circuit court said cause has been transferred by the act of Congress creating the said circuit court.

That afterwards, at the January term of said circuit court, to wit, on the 17th day of January, A. D. 1863, the said circuit court made an order in

said cause setting aside said sale, a copy of which order is hereto attached and marked "Exhibit No. 8."

4 That the said marshal afterwards advertised a sale under said decree (by advertisement, a copy of which is hereto attached and marked "Exhibit No. 9") for the 25th day of April, A. D. 1863, and on the day and year last aforesaid the said marshal sold the premises and other things advertised at public vendue, as follows: The said lands granted by Congress to William Wallace Pratt and William H. White, for 125,000 dollars, and the railroad, rolling stock, franchises, and other things advertised, to the same purchasers last mentioned for the sum of 2,675,000 dollars; but that said marshal has never made any report of said sale to the said circuit court, nor have any proceedings ever been had by said circuit court in relation to said sale, either confirming the same or otherwise.

That the said circuit court has never disposed of the said exceptions of said Chamberlain to said master's report in any way, but the same still remain as reserved by the order of said district court made in said cause, copy of which is Exhibit No. 6, for future hearing and determination by the said circuit court.

5 That at the September term of said circuit court, A. D. 1864, the said sale by said marshal last above mentioned, remaining unreported to said circuit court, your petitioner applied to said circuit court by petition, a copy of which, with the exhibits thereto attached, is hereto attached marked "Exhibit No. 10," to lay a rule upon the said marshal requiring him to report said sale to said circuit court, which petition sets forth your petitioner's interest in said sale and proceedings in said cause; and your petitioner here and now shows that all the matters and things stated in said petition are true as therein stated, and your petitioner prays that the copy thereof hereto attached, and marked "Exhibit No. 10," and all other exhibits hereto attached, may be taken as part of this petition in like manner as if the same were set out at length herein.

That the said circuit court afterwards, to wit, on the 29 day of September, A. D. 1864, as yet of the September term of said court A. D. 1864, made an order in said cause denying and refusing the said petition of your petitioner, a copy of which is hereto attached and marked "Exhibit No. 11."

Your petitioner further shows that said sale was improperly conducted in this, that said marshal advertised for sale and pretended to sell, subject to prior liens thereon, all the rolling stock pertaining to another division

6 of the La Crosse and Milwaukee railroad, so called, not embraced in the said mortgage and not decreed to be sold by the said decree hereinbefore mentioned; that said marshal pretended to report said last-mentioned sale to the said district court, and said district court thereafter pretended to confirm the same; but your petitioner is advised and submits that the said marshal ought to have reported the said sale to the said circuit court and not to said district court, and that the said district court had no jurisdiction over said cause for any purpose whatever after said cause was transferred to the said circuit court as hereinbefore mentioned; and that the pretended confirmation of said sale is void, and said sale remains in law unconfirmed, and that no steps can be taken to complete the foreclosure of said mortgage and protect the rights of your petitioner as a holder of bonds secured by said mortgage except by having said sale reported, as it ought to be, to the said circuit court.

Therefore your petitioner respectfully prays your honors, sitting in said Supreme Court of the United States, to order the writ of mandamus in due form to be at once issued from said Supreme Court returnable upon some day to be named therein, commanding and requiring the Honorable Samuel

F. Miller, presiding judge of said circuit court, and the Honorable
7 Andrew G. Miller, district judge of the United States for the district of Wisconsin, judge of said circuit court, and the said circuit court to cause a rule to be laid upon the marshal of the United States for said district, commanding said marshal forthwith to report to the said circuit court the said sale made by him in pretended pursuance of said decree, on the 25th day of April, A. D. 1863, to the end that the same may be confirmed by order of said circuit court, or that such other proceedings may be had therein as shall be agreeable to equity and good conscience; or on failure thereof, to show to said Supreme Court, on the return day of said writ of mandamus, why the same has not been done. And your petitioner will ever pray, &c.

MATT. H. CARPENTER, *of Counsel.*
A. FLEMING.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Alexander Fleming, being first duly sworn, on oath says that he has read and knows the contents of the foregoing petition by him subscribed, and that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and that as to those matters he believes it to be true.

A. FLEMING.

Subscribed and sworn to before me this 16th day of January, A. D. 1865, in open court, before me.

D. W. MIDDLETON, *C. S. C. U. S.*

8 EXHIBIT No. 1.

*Land grant mortgage.*

Deed of trust made this thirty-first day of December, in the year of our Lord one thousand eight hundred and fifty-six, (1856,) between the La Crosse and Milwaukee Railroad Company, a corporation created by the legislature of the State of Wisconsin, party of the first part, and Greene C. Bronson, James T. Soutter, and Shepherd Knapp, trustees, as after-mentioned, all of the city and State of New York, parties of the second part.

Whereas the Congress of the United States, by an act approved June 3, 1856, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," did enact as follows:

(Here follows said act.)

And whereas the legislature of said State of Wisconsin subsequently passed an act, approved October 11th, 1858, which is in the following words; "An act to grant certain lands to the La Crosse and Milwaukee Railroad Company, and to execute the trust created by an act of Congress entitled 'An act granting public lands to the State of Wisconsin, to aid in the construction of railroads in said State,'" approved June 3, 1856.

(Here follows said act.)

And whereas the said railroad company, after the passing of said last-mentioned act, and on the same day, duly accepted the same by a resolution adopted by the directors of said company, a copy of which, certified by the secretary of said company, under its corporate seal, was on the same
9 day deposited in the office of the secretary of State:

And whereas said railroad company, for the purpose of constructing its road from Madison, by way of Portage City, to St. Croix River or Lake, has determined to borrow a sum of money not exceeding ten million of dollars, and to issue its bonds for the repayment of the moneys which may be borrowed, with the interest thereon, nine thousand of which bonds (exclu-

sive of the numbering and interest warrants or coupons) will be substantially in the following form: "United States of America, State of Wisconsin. The *The* La Crosse and Milwaukee Railroad Company. Know all men by these presents that the La Crosse and Milwaukee Railroad Company acknowledge themselves to be indebted to the bearer hereof in the sum of one thousand dollars, lawful money of the United States, for money borrowed for the construction of their road from Madison to the St. Croix River or Lake, which sum they agree to pay to the bearer hereof, on the first day of February, in the year of our Lord 1877, at the Bank of the Republic, in the city of New York, with interest at the rate of seven per centum per annum, payable in the city of New York, semi annually, on the first day of February and the first day of August in each year, on presentation and delivery of the interest warrants or coupons hereto annexed. Said railroad company reserves the right to satisfy and discharge this bond at any time before the principal becomes due, by paying to the holder thereof the sum of eleven hundred dollars, with the interest up to the time of such payment, so far as the same may not have been previously paid. This is one of nine thousand bonds, all of the same tenor, and numbered from 1 to 9,000 respectively, which, with two thousand bonds for the sum of five hundred dollars each, numbered from 1 to 2,000 respectively, make in the aggregate the sum of ten millions of dollars; to secure the payments of all which bonds, a deed of trust has been executed by said railroad company to Greene C. Bronson, James T. Soutter, and Shepherd Knapp, conveying all such interest as said railroad company has acquired or may hereafter acquire, in all the land granted to said railroad company by the act of the legislature of the State of Wisconsin, approved October 11, 1856, entitled 'An act to grant certain lands to the La Crosse and Milwaukee Railroad Company, and to execute the trust created by an act of Congress entitled "An act granting certain lands to the State of Wisconsin, to aid in the construction of railroads in said State,"' approved June 3d, 1856, so far as the lands granted by said act of the legislature are applicable to the construction of the road of said railroad company from Madison, by way of Portage City, to St. Croix River or Lake, estimated to be about one million of acres; and also conveying all such interest as said railroad company has acquired or may hereafter acquire in said road from Madison to St. Croix River or Lake, and in the road from Portage City to La Crosse, with all the equipments and other things pertaining to said roads. Reference to which trust deed, bearing date the day of December, 1856, and reciting the said acts of Congress and the legislature, is hereby had and made for a more full description of said lands, roads, and other property, and the interest thereby conveyed to said trustees.

"In witness whereof, said railroad company has hereto affixed its corporate seal, with the names of its president and secretary, the first day of February, in the year of our Lord, 1857.

[L. S.]

"_____ _____, *President.*
"_____ _____, *Secretary.*

"Registered and countersigned by the trustees, this day of , 185 .

"_____ _____, *Trustees.*"

And two thousand of which bonds will be in the like form, but for the sum of five hundred dollars each.

And whereas said railroad company has determined to secure the payments of such bonds as may be issued as aforesaid, in the manner herein provided: Now, therefore, this deed witnesseth, that the said railroad company, in

consideration of the premises, and of the sum of one dollar paid by said parties of the second part, has granted, bargained, sold, conveyed, and confirmed, and does by these presents grant, bargain, sell, convey, and confirm unto said parties of the second part, all and singular the several tracts, pieces, or parcels of land which now are or may hereafter be or constitute the site of the roadway, turnouts, engine-houses, workshops, depots, and other buildings, and all the other lands and real estate which now
11 constitute or may hereafter constitute or be a part of the roads of said railroad company from Madison, by way of Portage City, to the St. Croix River or Lake, between townships twenty-five and thirty-one, and from Portage City to La Crosse; and also all and singular the superstructure of said roads, whether now made or to be made hereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or pertaining to said roads, whether now built and made or to be built and made hereafter. And also all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description which have already been or may hereafter be procured for or used on said roads, or either of them, and all the materials, tools, implements, utensils, and other personal property, which have been, or may hereafter be procured for or used in connection with said roads, or either of them; and also all and singular the rights, liberties, privileges, and franchises of said railroad company of every kind and description relating to said roads.

And furthermore, and upon the consideration aforesaid, the said railroad company has granted, bargained, sold, conveyed, and confirmed, and does by these presents grant, bargain, sell, convey, and confirm unto said parties of the second part, all and singular the lands granted or intended to be granted to said railroad company, under or by virtue of the act of Congress and the act of the legislature of Wisconsin, hereinbefore mentioned, so far as the said lands pertain or are applicable to the construction of said roads from Madison, by way of Portage City, to the St. Croix River or Lake, estimated to be about one million of acres of land, together with all and singular the hereditaments and appurtenances belonging or in anywise appertaining to the lands and real estate hereby conveyed, or intended to be conveyed. And it is hereby declared to be the intention of the parties to these presents to convey to and vest in said parties of the second part, all the property, real and personal, of said railroad company to be acquired hereafter, as well as that which has already been acquired, together with all the rights, liberties, privileges, and franchises of said railroad company, in respect to the roads above mentioned, as fully and amply as the same might be conveyed if the said railroads had already been fully constructed and equipped, and the particular lands granted by the foregoing acts of Congress and the legislature, so far as the same are applicable to the
12 construction of said road from Madison to St. Croix River or Lake, had already been designated and conveyed to said railroad company.

To have and to hold all and singular the property, real and personal, with the hereditaments and appurtenances, and all and singular the rights, liberties, privileges, and franchises hereby conveyed, or intended to be conveyed, to the said parties of the second part, and the survivors and survivor, successors and successor of them, and their and his heirs and assigns, forever, as joint tenants, and not as tenants in common. In trust, nevertheless, and upon the trusts, terms, and conditions herein expressed:

First. Until default shall be made in the payment of said bonds, or some of them, or the interest thereon, said railroad company shall be suffered and permitted to possess, hold, and enjoy said roads from Madison to St. Croix River or Lake, and from Portage City to La Crosse, with the equipments and all other things appertaining to said roads, and use the same, and take

and receive the income and profits thereof, in the same manner as though this deed had not been made.

Second. When said road from Madison to St. Croix River or Lake shall be surveyed and located, and the particular lands granted as aforesaid, to aid in the construction thereof, shall be ascertained, said railroad company will make schedules of the several sections and parcels of said lands, and affix thereto the minimum prices at which the same are to be sold, which prices shall in the aggregate for all of said lands amount to the sum of ten million of dollars at the least, and will furnish such schedules, duly certified by said railroad company, to said parties of the second part, together with an affidavit of the president and secretary of said railroad company, that, to the best of their knowledge, information, and belief, the minimum prices have been fairly fixed, having reference to the relative values of the different sections and parcels of land; and whenever said railroad company shall certify, in writing, to said trustees that it has contracted for the sale of any section or parcel of said lands at a sum not less than the minimum price affixed to the same, and ten per centum at the least of the consideration money shall be paid to the said trustees, and a bond and mortgage in the proper form from the purchaser to the trustees, securing the payment of the residue of the consideration money, with the interest thereon, as
13 hereinafter mentioned, shall be delivered to said trustees, the mortgage having been first duly acknowledged and recorded, the said trustees will thereupon make, execute, and acknowledge a deed, conveying to such purchaser, his heirs and assigns, all the right, title, interest, and estate of the said trustees of, in, and to the section or parcel of land so sold, with a covenant that they have not done any act, matter, or thing to defeat or prejudice their title to the lands so conveyed. The principal sum secured by the bond and mortgage of the purchaser must be made payable on or before the first day of February, one thousand eight hundred and seventy-five, and the interest thereon must be at the rate of seven per centum per annum, and be payable annually. The deed of the trustees to the purchaser will bear even date with the bond and mortgage, and will specify the true amount of consideration money, and the manner in which the same has been paid or secured.

Sales may be made in like manner of any section or parcel of said lands, at a less sum than the minimum price affixed to the same in such schedules, provided the president or secretary of said railroad company shall make and furnish to said trustees an affidavit that the price agreed on is, in his opinion, the full market value of the land so sold; and provided, also, that the aggregate sums on all sales then and previously made shall be equal to or above the aggregate for all the land sold as specified in said schedule.

Third. The consideration money on any such sale of land may be paid, either in whole or in part, by delivering to said trustees to be cancelled, one or more of the bonds which may have been issued by the railroad company as aforesaid, at their par value; and payments upon any such mortgage as aforesaid may be made by delivering to said trustees one or more of such bonds of the railroad company as aforesaid, at their par value; and two or more purchasers may unite and pay a part or all of the aggregate amount of consideration money on their purchases, or a part of all of the aggregate amount of their mortgages in like manner.

Fourth. All money which may be received by said trustees, under or in pursuance of this trust, after deducting therefrom their compensation for accepting and executing the trust, and all costs, counsel fees, charges, and other expenses, shall constitute a sinking fund for the redemption
14 and payment of the bonds, so to be issued by the railroad company as aforesaid, and shall be faithfully applied to that object; and until

the moneys shall be so applied the same shall be deposited in one of the trust companies in the city of New York upon the best terms which can be procured for the same. And whenever there shall be any money so on deposit said trustees may, in their discretion, apply the same to the purchase of the bonds which may have been issued by the railroad company as aforesaid, at their market value in the city of New York, provided such market value shall not exceed the par value thereof. And whenever the sum so on deposit shall exceed twenty-five thousand dollars, the surplus beyond that sum shall be so applied by said trustees; and in case a sufficient amount of bonds to absorb said surplus cannot be obtained at par in the city of New York, such trustees shall, on the written request of said railroad company, make purchase of bonds at a premium not exceeding ten per centum if the same can be had in the New York market.

Fifth. Whenever the trustees shall receive any of the bonds above mentioned in payment for lands sold, or on mortgages, or shall purchase any bonds, as above provided, the same, with any unpaid interest warrants or coupons annexed thereto, shall be immediately cancelled, and shall thereafter only be held as vouchers by said trustees.

Sixth. In case default for the space of sixty days shall be made in the payment of any of said interest warrants or coupons, as they respectively fall due, it shall thereupon be lawful, and said trustees are hereby authorized and empowered, in their discretion, to sell, at public or private sale, for the best prices which can be obtained for the same, all or any portion of the lands mentioned in such schedule, for the purpose of obtaining the necessary funds to satisfy such default, and may appoint one or more agents or attorneys to make such sales, execute conveyances to the purchasers, and receive the purchase money; and if the sum in default shall at any time be equal to the amount of the interest, for one year, on all the bonds then outstanding, and the same cannot be satisfied within a reasonable time by such sales of lands, or if default shall be made in the payment of the principal sum of said bonds, at maturity, said trustees may thereupon, in their discretion, either in person or by their attorney or attorneys, agent or agents, appointed for that purpose, enter into and upon, and take possession of all and singular the said road from Madison to the St. Croix River or Lake, and from Portage City to La Crosse, and all the other property, real and personal, hereinbefore conveyed, or intended to be conveyed; and may operate said road, and take and receive the income and profits thereof, and may sell all and singular the said roads, and all the other property, real and personal, hereby conveyed, or intended to be conveyed, either at public or private sale, and execute and deliver to the purchaser or purchasers deeds and conveyances, which shall vest in such purchaser or purchasers all the estate, right, title, and interest, whether legal or equitable, of said trustees, and said railroad company, of, in, or to said property, and every part and parcel thereof, including the rights, liberties, privileges, and franchises of said railroad company, in respect to the roads which may be sold as aforesaid; but before any sale of the said lands, or either of them, or the rights, liberties, privileges, or franchises aforesaid, shall be made at auction, notice of such intended sale shall be published, once in each week for twelve weeks at least, in two newspapers published in the city of New York, and in three newspapers, at the least, published in the State of Wisconsin, one of which shall be published in the city of Milwaukee; and should any further notice be required by the laws of the State of Wisconsin, the same shall be given; and on the written request of the holder or holders of the major part in amount of the bonds then outstanding the trustees shall proceed to sell and convey said property in the manner herein provided.

Seventh. Said railroad company will cause this deed to be duly recorded

in all proper places, and will satisfy and discharge all taxes, charges, liens, and other burdens, which either exist or may hereafter be imposed or arise on the whole or any part of the property hereby conveyed or intended to be conveyed; and said trustees assume no duty or responsibility on those subjects, or in relation to any other matter, except as is herein provided.

Eighth. Said trustees may appoint all such attorneys, counsellors, clerks, and other agents, as they may deem proper, in the execution of the trust, and shall not be answerable for the defaults or other misconduct of such attorneys, counsellors, clerks, or other agents, unless chargeable with culpable negligence in their selection; and further, neither of the trustees shall
16 be answerable for the acts, omissions, or defaults of his associates or associate, nor shall either of the trustees be responsible for anything short of gross negligence or wilful defaults in the discharge of his duties.

Ninth. This trust extends to such bonds, and such only, as shall be registered and countersigned by said trustees; and when all of said bonds shall be satisfied and discharged, the trust shall cease. The trust shall also cease at the end of six calendar months after the principal moneys shall fall due, as to all such bonds as shall not then have been presented for payment; and whenever the trust shall determine, and any moneys which may be due to the trustees shall be paid, the trustees will reconvey to said railroad company all their rights, title, and interest of, in, and to all of said trust property, which may not have been previously disposed of in pursuance of the trust.

Tenth. All the powers and duties of the trustees may be executed and discharged by any two of them; and in case of the death, incapacity to serve, or resignation of any trustee, all the estate and interest hereby created shall vest in the other trustees or trustee, as fully as if they or he only had been named in and had enacted the deed.

The supreme court in the first judicial district of the State of New York may remove either of the trustees, on the application of his associates, or of the railroad company, reasonable notice being first given to such trustees. Any trustee may resign his trust, and thenceforward be discharged from all further duty or obligation in relation to it, provided such resignation, after reasonable notice to the president or secretary of said railroad company and the other trustees, shall be approved by said supreme court. If at any time there shall be only one trustee capable of acting, said supreme court, on reasonable notice to such trustee and said president or secretary, may appoint a new trustee, who shall thereupon acquire and have all rights, titles, interest, and authority under the trust, and subject to all duties and responsibilities in relation to the same, as fully as though he had been originally named as a trustee, and had executed this deed.

Eleventh. Said railroad company will, from time to time, pay all such costs, charges, and expenses as the trustees may sustain or be put to in the execution of the trust, and keep them fully indemnified in the premises.
17 Said trustees hereby accept and covenant, and agree to and with said railroad company, faithfully to execute said trust; and said railroad company hereby covenants and agrees to and with said trustees, the survivors and survivor, successors and successor of them, that said railroad company will from time to time, during the continuance of the trust, make, execute, cause to be duly recorded, and deliver to said trustees, or to the persons who shall then be trustees, all such further conveyances and assurances, and will do all such further acts, as may be either necessary or proper for more effectually vesting in said trustees all such rights, titles, interest, or estates, both legal and equitable, as said railroad company now has, or may hereafter acquire, of, in, or to all and every part of the property hereby conveyed, or intended to be conveyed.

In witness whereof, said railroad company has hereto affixed its corporate [L. S.] seal, and caused the same to be subscribed by its president and secretary; and the trustees have subscribed their names and affixed their seals the day and year first above written.

BYRON KILBOURN, *President.*
EDWIN H. GOODRICH,
*Secretary of the Railroad Company.*

GREENE C. BRONSON,
JAMES T. SOUTTER,
SHEPHERD KNAPP,
*Trustees.*

Witnesses as to Byron Kilbourn, president, and Edwin H. Goodrich, secretary:

E. MARINER.
S. H. ALDEN.

Witnesses as to Messrs. Soutter and Knapp:

J. S. ATWOOD.
JOHN BISSELL.

Witnesses for Greene C. Bronson, as to the execution of the foregoing instrument by him:

EDWARD WADE.
S. H. ALDEN.

18 EXHIBIT No. 2.

*Foreclosure bill.*

District court of the United States, district of Wisconsin.

GREENE C. BRONSON, JAMES T. SOUTTER, AND SHEPHERD KNAPP, trustees, &c.,
*against*
LA CROSSE & MILWAUKEE RAILROAD COMPANY, J. ALBERT Helfenstein, trustee, Selah Chamberlain, Newcomb Cleveland, Edwin Townsend, Franklin J. Blair, Edmund R. Persons, Leman Graham, Daniel D. Scott, Avery Hill, A. V. Rudd, E. Bradford Greenleaf, John H. Tesch, Dewitt C. Freeman, Ephraim Mariner, Thomas Turton, John Sercomb, Sebastian Knetzger, Frederick Lind, Edward H. Brodhead, Joshua Hathaway, William Gemmell, Charles Quentin, August Sauthof, Sebre Howard, Lawrence G Graham, Donald G. Scott, the Milwaukee and Minnesota Railroad Company, Moses M. Davis.

19 To the judges of the circuit court of the United States for the district of Wisconsin:

Greene C. Bronson, James T. Soutter, and Sheperd Knapp, trustees, as hereinafter mentioned, all of whom are residents of the city of New York, and citizens of the State of New York, bring this their bill, against La Crosse and Milwaukee Railroad Company, a corporation duly established under the laws of the State of Wisconsin, J. Albert Helfenstein, trustee, Edwin Townsend, Franklin J. Blair, Edmund R. Persons, Leman Graham, Daniel D. Scott, Avery Hill, A. V. Rudd, E. Bradford Greenleaf, John H.

Tesch, Dewitt C. Freeman, Ephraim Mariner, Thomas Turten, John Sercom, Sebastian Knetzger, Frederick Lind, Edward H. Brodhead, Charles Quentin, August Sauthof, Sebre Howard, Lawrence G. Graham, Donald G. Scott, the Milwaukee and Minnesota Railroad Company, Moses M. Davis, all whom are residents and citizens of said State of Wisconsin; and Selah Chamberlain, who is a citizen and resident of the State of Ohio; Newcomb Cleveland, who is a citizen and resident of the State of Illinois; Joshua Hathaway, who is a citizen and resident of the State of Georgia; and William Gemmell, who is an alien, and a resident of Scotland, in the kingdom of Great Britain, and a subject of the Queen of Great Britain.

And thereupon your orators complain and say that the several actions and doings hereinafter stated and set forth, so far as they purport to be the acts or doings of your orators, are true of their own knowledge; and as to all the other matters and things hereinafter stated and set forth, your orators are informed and verily believe that the same are true.

20 Under and in pursuance of an act of the legislature of the State of Wisconsin, entitled "An act to incorporate the La Crosse and Milwaukee Railroad Company," approved April 2, 1852, the La Crosse and Milwaukee Railroad Company became and was a body politic and corporate by that name and style, with all such powers, rights, privileges, franchises, and immunities as are mentioned in said act, and particularly with the power, right, privilege, and franchise of constructing and using a railroad in said State of Wisconsin, from La Crosse, in the county of La Crosse, to some point in the city of Milwaukee, a distance of about two hundred miles; which said company has ever since had and still has its office and principal place of business in said city of Milwaukee, and as your orators are advised and believe said corporation is a citizen of the State of Wisconsin within the meaning of the constitution and laws of the United States relating to the jurisdiction of the federal courts.

By several other acts of said legislature relating to said company, and by acts concerning or relating to railroad companies in general, in said State of Wisconsin, all passed subsequently to said act of incorporation, and before the making of the trust deed hereinafter mentioned, said company became entitled to the additional powers, rights, privileges, franchises, and immunities mentioned in said several acts. To all of which said acts or statutes, including the original act of incorporation, and also to an act of the Congress of the United States, entitled "An act granting public lands to the State of Wisconsin, to aid in the construction of railroads in said State," approved June 3, 1856, and being chapter 43 of the Laws of 1856, your orators hereby refer, and pray that the same may be taken and received as part of this bill of complaint, as fully as if the same were herein recited and set forth at large.

Among the acts to which reference is above made, your orators particularly refer to said act of Congress, by which, among other things, certain lands were granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad from Madison or Columbus, by way of Portage City, to the St. Croix River or Lake, and from thence to the west end of Lake Superior and to Bayfield; and to the act of the legislature of Wisconsin, approved October 11, 1856, by which said company was authorized and empowered, among other things, to construct and operate a

21 railroad from Madison, in the county of Dane, and from the village of Columbus, in the county of Columbia, by the way of Portage City, to St. Croix River or Lake, and from thence to the west end of Lake Superior, and to Bayfield; and by which act all the lands which had been granted to said State of Wisconsin, by the government of the United States, to aid in the construction of the railroad in question, were, upon certain terms and

conditions therein mentioned, granted to said La Crosse and Milwaukee Railroad Company, which said act was accepted and agreed to by said company, within five days after the passing the same, to wit, on the 11th day of October, 1856, by a resolution adopted by the directors of said company, and a copy of which resolution, duly certified by the secretary of said company, under its corporate or common seal, was within said five days, and on the day last mentioned, deposited in the office of the secretary of state of said State of Wisconsin.

Soon after the passing of the original act of incorporation, said company was organized and commenced the construction of the railroad therein mentioned, from La Crosse to Milwaukee, and continued said work until the making of the trust deed hereinafter mentioned, at which time said company had completed and put in operation a portion of the road, from a point in the city of Milwaukee to Portage City, or near that place, a distance of about ninety-five miles.

On or about the thirtieth day of December, in the year of our Lord 1856, the board of directors of said company adopted resolutions to make the trust deed to your orators, and to issue bonds as hereinafter mentioned, a true copy of which said resolutions (with the exception of that part of the second resolution which follows the words "Now, therefore, this deed witnesseth," which part is in the same words with the corresponding part of said trust deed, and including all the remaining part of said deed down to the words, "In witness whereof,") is hereunto annexed, and marked Schedule A, and which resolutions your orators pray may be taken and received as a part of this their bill of complaint.

Afterwards, and on or about the thirty-first day of December, in the year of our Lord 1856, said La Crosse and Milwaukee Railroad Company made its certain trust deed of that date, in the nature of a mortgage, between said party of the first part, and your orators as parties of the second
22 part; which deed was duly sealed with the corporate or common seal of said company, and subscribed by the president and secretary of said company, and was also subscribed by your orators, and delivered said deed to your orators, by which said deed said company, after reciting at large said act of Congress and said act of the legislature of Wisconsin of the 11th of October, 1856, and after also reciting the determination of the company to borrow a sum of money not exceeding ten million of dollars, and to issue the bonds of the company for the repayment of the said money, the form of which bonds was recited and set forth at large in said deed, and after also reciting the determination of the company to secure the payment of the bonds in the manner therein provided, did, for the purpose of securing the payment of said bonds, and the interest warrants or coupons thereto annexed, and upon the trusts in said deed mentioned and contained, grant, bargain, sell, convey and confirm to your orators all and singular the several tracts, pieces, or parcels of land which then were or might thereafter be or constitute the site of the railway, turnouts, engine-houses, workshops, depots, and other buildings, and all the lands and real estate which then constituted or might thereafter constitute or be a part of the roads of said railroad company, from Madison, by way of Portage City, to the St. Croix River or Lake, and from Portage City to La Crosse, and all the other property, real and personal, mentioned in said deed, and also all the rights, liberties, privileges, and franchises, of said company, relating to said roads, and all the lands granted or intended to be granted to said company, under or by virtue of said act of Congress and said act of the legislature, so far as said lands pertained or were applicable to the construction of said road from Madison, by way of Portage City, to St. Croix River or Lake. To have and to hold the same to your orators, and the survivors and survivor, successors and

successor, of them, and their and his heirs and assigns forever, as joint tenants and not as tenants in common; in trust, nevertheless, and upon the trusts, terms, and conditions in said deed expressed, as by said in part recited deed, now in possession of your orators, and ready to be produced as the court shall direct, will more fully and at large appear; a true copy of which said deed, with the exception of said act of Congress, and said act of the legislature of the State of Wisconsin of the 11th of October, 1856, which are therein recited at large, is hereunto annexed, and marked Schedule B, and which copy your orators pray may be taken and received
23 as a part of this their bill of complaint; which said trust deed, after having been duly acknowledged by all the parties thereto, was duly recorded in the office of the secretary of state of said State of Wisconsin, on the thirteenth day of January, in the year of our Lord 1857, in the Book of Railroad Mortgages, pages 92 to 108, inclusive, reference to which said record is also hereby had and made.

Afterwards, on or about the first day of February, in the year of our Lord 1857, said La Crosse and Milwaukee Railroad Company made its several negotiable bonds of that date in the form mentioned in said trust deed, and sealed the same with the corporate or common seal of said company, and caused the names of its president and secretary to be thereto affixed, each of which bonds was for the payment of the principal sum of money therein mentioned, to the bearer of said bond, on the first day of February, in the year of our Lord 1877, with interest at the rate of seven per centum per annum, payable in the city of New York, on the first day of February and the first day of August in each year, on presentation and delivery of the interest warrants or coupons to said bonds annexed; interest warrants or coupons for the payment of said interest at the times above mentioned, were annexed to each of said bonds, and all of which bonds were severally for the payment of the principal sum of one thousand dollars, except one hundred bonds, which were severally for the payment of the principal sum of five hundred dollars. Parcels of said bonds were from time to time registered and countersigned by your orators; and the schedule hereunto annexed, and marked C, shows the several times when such registry and countersigning were made, with the numbers and denomination of the bonds so registered and countersigned on each occasion, which schedule your orators pray may be taken and received as a part of this their bill of complaint.

Afterwards, and about the several times when said bonds were so registered and countersigned by your orators, said company sold, issued, and delivered said bonds to a great number of individuals, partnership firms, and corporate bodies, who thereupon and thereby became the bearers and holders of said bonds, and entitled to the moneys therein mentioned and agreed to be paid. And the bonds so made, registered, and countersigned, and so sold, issued, and delivered, amounted in the aggregate to four millions of dollars of principal money, and no more; and have (or most
24 of them) come, by transfer, into the hands of a large number of persons, some of whom are unknown to your orators, and are too numerous to be made parties to this action.

After two thousand five hundred of said bonds of one thousand dollars each, amounting to two and a half million of dollars, had been so sold, issued, and delivered, and on or about the twenty-eighth day of January, in the year of our Lord 1058, said La Crosse and Milwaukee Railroad Company, in pursuance of its covenant in said trust deed, for further assurance, and for the purpose of better and more effectually securing the payment of the bonds which had already been issued, and such bonds as should thereafter be issued, to the amount in all of four millions of dollars, made its certain indenture or deed of that date, sealed with the corporate or common seal of

said company, and subscribed by its president and secretary, and delivered said indenture or deed to your orators; and thereby said company did grant, covenant, and agree to and with your orators as is stated and contained in said indenture or deed; a true copy of which said indenture or deed is hereunto annexed and marked Schedule D, to which your orators refer, and pray that the same may be received and taken as a part of this their bill of complaint, which said indenture or deed, after having been duly acknowledged, was duly recorded in the office of the secretary of state of said State of Wisconsin, in the Book of Railroad Mortgages, on page 321 to 326, both inclusive, on the 11th day of February, 1858, to which record your orators also refer for the contents of said indenture.

Soon after the making of said trust deed, and in January, 1857, said company commenced the construction of that part of said road from La Crosse to Milwaukee which lies or is situate between La Crosse and Portage City, and completed the same from Portage City to La Crosse, a distance of about one hundred and four or five miles, in the month of October, 1858. A part of the road so constructed, to wit, that part which lies or is situate between Portage City and Tomah, otherwise called The Junction, a distance of about sixty-one miles, is also part and parcel of said road from Madison, by way of Portage City, to the St. Croix River or Lake, to aid in the construction of which lands were granted to the State of Wisconsin and to said company, as hereinbefore mentioned. But neither said company nor your orators has or have obtained any deed or other evidence of title to any portion of said lands, or anything further than may be found in the act of Congress and the act of the legislature of Wisconsin of the 11th of October, 1855, hereinbefore mentioned. The governor of said State of Wisconsin has refused, and still refuses, to give the certificate required by said act to the Secretary of the Interior, and wholly denies that either said railroad company or your orators are entitled to any lands by reason or on account of having constructed said road from Portage City to Tomah, as hereinafter mentioned.

About the first of October, in the year 1857, one Selah Chamberlain, who, for several years last past, has resided most of the time in the State of Wisconsin, and who, if not a citizen of that State, is a citizen of the State of Ohio, under some agreement or arrangement between himself and said railroad company, made subsequently to the right, title, and lien of your orators, and in terms subject and subordinate to the right, title, and lien of your orators, entered into the possession, use, and enjoyment of all that portion of the railroad of said company which had then been completed, which portion extended from the city of Milwaukee, westward, to and beyond Portage City, and from time to time, as sections of the road further west were completed, entered into the possession, use, and enjoyment of the same, and ever since said railroad was completed to La Crosse, as above mentioned, has been and still is in the exclusive possession, use, and enjoyment of the entire road from Milwaukee to La Crosse, with all things appertaining to the same; and said Chamberlain, during all the time aforesaid, has taken and received to his own private use and benefit, and still does take and receive to his own private use and benefit, all and singular the rents, issues, profits, and income of said railroad, with its equipments and appurtenances.

On the first day of August, in the year 1858, said railroad company utterly failed and made default in the payment of the half-year's interest which then became due and payable on said bonds, and wholly neglected and refused to pay the interest warrants or coupons which became due and payable on that day, which said default in payment has ever since continued, and no part of the interest which should have been paid on said first day of August has ever been paid by said company. A small number, about forty or fifty, of

the interest warrants or coupons which became due on said first day of August were, within a few month afterwards, surrendered or delivered by bondholders to some officer of the company, on some security or engagement by the company to pay the amount in future; but such payment
26 has not been made, nor have said interest warrants or coupons ever been cancelled or destroyed.

On the first day of February, in the year 1859, and again on the first day of August, in that year, said company utterly failed and made default in the payment of the interest, interest warrants, or coupons, which became due and payable on those days, respectively, and said company never has paid the whole or any part of the moneys which, according to the tenor and effect of said bonds, should have been paid on those days; and ever since said first day of August, 1859, the amount of interest in arrear and unpaid on said bonds has exceeded the sum of four hundred thousand dollars.

Said company has not acquired title to all the lands which constitute the site of the road from Portage City to La Crosse, nor to all the lands used for depot, engine, station, and other buildings pertaining to said road; the road was not constructed in a substantial or enduring manner, and is continually suffering deterioration from time and use, and said road, with its appurtenances, is not, in the judgment of your orators, worth more than the sum of one million of dollars. And should your orators obtain said lands granted by Congress and the legislature of Wisconsin, so far as the same are or may be applicable to said road between Portage City and Tomah, as above mentioned, it would not add more than half a million of dollars to the security of the bondholders, the lands in question being of poor soil and quality, and of little value as compared with other lands in the same State. Said railroad company now is, and for a long time past has been, utterly insolvent, and wholly destitute of property; said Chamberlain is also in insolvent circumstances; and, in any event, the bondholders will lose more than half, and probably fully three fourths, of the moneys due to them from said company as such bondholders; and the longer the bondholders are delayed in obtaining possession of said road from Portage City to La Crosse, and getting into the receipt of the income and profits of the same, the greater their loss will be.

On or about the twenty-third day of August, 1859, your orators, by their attorney and agent, demanded of said Selah Chamberlain the possession and enjoyment of said railroad from Portage City to La Crosse, with all things appertaining to the same; but said Chamberlain utterly refused, and
27 ever since has neglected and refused to surrender the possession of said road, or its equipment or appurtenances, to your orators, and still continues to use and enjoy said road, with its appurtenances, and to take and receive the income and profits of the same to his own private use and benefit.

J. Albert Helfenstein, trustee, Selah Chamberlain, Newcomb Cleveland, Edwin Townsend, Franklin J. Blair, Edmund R. Persons, Leman Graham, Daniel D. Scott, Avery Hill, A. V. Rudd, E. Bradford Greenleaf, John H. Tesch, Dewitt C. Freeman, Ephraim Mariner, Thomas Turton, John Sercomb, Sebastian Knetzger, Frederick Lind, Edward H. Brodhead, Joshua Hathaway, William Gemmell, Charles Quentin, August Sauthof, Sebre Howard, Lawrence G. Graham, Donald G Scott, the Milwaukee and Minnesota Railroad Company, Moses M. Davis, have or claim to have some interest in or lien upon the said mortgaged premises, or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of said morage to your orators.

No proceedings at law have been had nor any suit or action commenced by or on behalf of your orators, or any holder of any of the bonds of said com-

pany secured by the mortgage aforesaid, or any or either of them, or any interest unpaid or accrued thereon, except only this action.

In tender consideration whereof, and forasmuch as your orators are remediless in the premises at and by the strict rules of the common law, and are only relievable in a court of equity, where matters of this kind are properly cognizable and relievable—

Your orators therefore pray the aid of this honorable court, and that the La Crosse and Milwaukee Railroad Company may be decreed to pay to your orators said principal sum of money above mentioned, with the arrears of interest now due, or hereafter to become due and payable thereon, together with the costs and charges in this behalf expended, and in default thereof, that said defendants above named, and all persons claiming and to claim under them, or either of them, or otherwise, may be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part thereof, and may deliver unto said complainants the deeds, demises, and writings relating to or concerning
28 all same; and that all and singular said mortgaged premises, with the appurtenances, property, and effects in said mortgage described, may be sold under the decree of this court, and that out of the money arising from the sale thereof your orators may be paid the principal sum due on said bonds of the said the La Crosse and Milwaukee Railroad Company, and all interest money due and to become due thereon, together with their commissions or compensation, and all costs and charges by them in this behalf sustained, or that they may have such other or further relief in the premises as may seem proper, and shall be agreeable to equity and good conscience.

And that an account may be taken of the bonds secured by the said mortgage to your orators, and of the amount due on those bonds for principal and interest, or either, and that the names of the lawful holders thereof may be ascertained.

That your orators, as trustees as aforesaid, may be let into the possession of the said railroad from La Crosse to Portage City, and the incomes, tolls, and profits of the same; and also all the depots, machine-shops, station-houses, and other real estate, equipment, and appurtenances connected with that part of the railroad of said last-mentioned company which lies between Portage City and La Crosse, at the date of the said first-mentioned mortgage, or at any time since, and also all the other property included in and covered by said mortgage.

And as to the several persons above named, who are properly parties to this bill of complaint, and not citizens of the State of Wisconsin, and who may be out of the jurisdiction of this court, your orators pray that process may be issued to make them parties, if they shall come within such jurisdiction, and that a receiver may be appointed according to the course of practice of this court, and with the usual powers of receivers in like cases, of all the property, equitable interests, things in action, effects, moneys, receipts, and earnings of said defendants, the La Crosse and Milwaukee Railroad Company, or said Chamberlain, as far as relates to said railroad from La Crosse to Portage City.

May it please your honor to grant unto your orators the people's writ of subpœna, to be issued under the seal of this court, directed to said
29 * defendants, respectively, therein and thereby commanding them, on a certain day and under a certain penalty, to be and appear before the judge of this honorable court, then and there to answer this bill of complaint,

and to stand to and abide by such order and decree in the premises as shall seem meet and agreeable to equity and good conscience.

And your orators will ever pray.

GREENE C. BRONSON,
JAS. T. SOUTTER,
SHEPHERD KNAPP,
*Trustees.*

CARY & PRATT,
*Complainants' Solicitors.*
CLARKSON N. POTTER,
*Of Counsel.*

STATE OF NEW YORK,
*City and county of New York, ss:*

On this 30th day of November, 1859, personally appeared before me, Greene C. Bronson, James T. Soutter and Shepherd Knapp, known to me to be the plaintiffs in the above action, who being by me severally sworn, did depose and say, the said Bronson, that he had read the foregoing bill of complaint, and the said Knapp and Soutter that they had heard the same read respectively, and that they respectively knew the contents thereof, and that the said bill of complaint is true of their own knowledge, except as to the matters which are therein stated to be upon their information and belief, and as to those matters, they severally believe it to be true.

As witness my hand and official seal the day and year aforesaid.

[L. S.] ALEX. OSTRANDER,
*Commissioner for Wisconsin in New York.*

30 EXHIBIT No. 3.—*Order of reference.*

UNITED STATES OF AMERICA,
*District of Wisconsin, ss:*

At a stated term of the district court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the seventh day) of January, A. D. 1861. Present: the Honorable Andrew G. Miller, judge of said court, presiding.

On the twenty-third day of the said term, to wit, on the 11th day of March, A. D. 1861, the following proceedings were had, to wit:

GREENE C. BRONSON, JAMES T. SOUTTER, AND SHEPHERD Knapp, trustees,
*vs.*
LA CROSSE AND MILWAUKEE RAILROAD COMPANY, J. Albert Helfenstein, trustee, *et als.*
} In equity.

This day came the parties by their counsel, and on consideration of the pleadings, proofs, and the arguments of counsel, it is ordered by the court that reference be, and hereby is, made to Winfield Smith, a master, and to Jerome R. Brigham and Joshua Hathaway, special masters, to ascertain and report the amount of interest due and unpaid on the bonds described in the mortgage or deed of trust, and the real amount of said bonds.

31 And the said master shall ascertain and report the amounts of the several judgments of Newcomb Cleveland, Sebre Howard, and of Graham & Scott.

And it is further ordered that the said master report the amount of the several specific claims of Selah Chamberlain, and also an account of his receipts, set-offs, and credits, and of such as should be made to his claims,

including his receipts of revenues of the whole road, without regard to its divisions by the mortgages; and that they may examine the said Chamberlain under oath, and require him to produce his books, and they may also take additional testimony to that on file.

And it is further ordered that the said masters ascertain and report the whole amount of rolling stock on the road, and that they specify the quantity thereof that is covered by and included in this mortgage; and also in the first and second mortgages respectively.

March 21, 1861.—Ordered by the judge that Increase A. Lapham be, and hereby is, appointed a special master in this case, in the place of Joshua Hathaway, who declined serving.

33 EXHIBIT No. 4.

*Masters' report, foreclosure cause.*

District court of the United States for the district of Wisconsin.

GREENE C. BRONSON, JAMES T. SOUTTER, AND SHEPHERD Knapp, trustees, *vs.* THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY, J. Albert Helfenstein, trustee, *et als.* } In equity.

To the Hon. A. G. Miller, judge:

In pursuance and by virtue of an order of reference made in this cause of the eleventh day of March, A. D. 1861, and of an order supplementary thereto, made on the twenty-first day of March, A. D. 1861, we, the undersigned, Winfield Smith, a master, and Jerome R. Brigham and Increase J. Lapham, special masters of this court, do respectfully report:

That we have been attended by the counsel for the parties, and have taken proofs in regard to the matter referred by the said order, in addition to that on file, which proofs are herewith returned, consisting of the copies of depositions and of exhibits, the originals whereof are returned by us and filed in this court in the other cause depending in said court, in which
33 the said depositions and exhibits have been taken, on an order of reference and order supplementary thereto, made of the same dates as above; in which cause Greene C. Bronson and James S. Soutter, trustees, are complainants, and the said La Crosse and Milwaukee Railroad Company and others are defendants.

We further report that we have passed over the line of the railroad of the said La Crosse and Milwaukee Railroad Company, and have examined those portions thereof where any of the work done by the defendant, Selah Chamberlain, as stated in the pleadings and testimony in this cause, was performed. Previous to which we gave notice of our intended examination to the counsel for the defendant, Chamberlain, and to the counsel for the defendants, Howard, Graham, and Scott, and the Milwaukee and Minnesota Railroad Company, informing them that they and engineers selected by them were at liberty to accompany us and assist in making such examination. We also endeavored, but without success, to procure the attendance and aid of Mr. Benjamin H. Edgerton, a civil engineer, whose testimony is among the depositions taken by us, as above stated.

We have ascertained and computed the amount of interest due and unpaid on the bonds described in the mortgage or deed of trust to the complainants set forth in the bill of complaint in this cause, and the real amount of the said bonds.

The real amount of those of the said bonds, numbered from one to one

thousand nine hundred and ninety-one, inclusive, being 1,991 bonds first issued, of one thousand dollars each, at one hundred cents on the dollar, is one million nine hundred ninety-one thousand dollars, ($1,991,000.) The interest thereon, from February 1, 1857, to the date hereof, at seven per cent., is $638,779 17, (six hundred thirty-eight thousand seven hundred seventy-nine dollars and seventeen cents;) of which sum there is due upon the coupons attached to said bonds, and payable in February and August of each year, the sum of six hundred twenty-seven thousand one hundred sixty-five dollars, which sum has been due since the first day of August, A. D. 1861.

The real amount of those of the said bonds numbered from one thousand nine hundred ninety-two to two thousand five hundred, both inclusive, being 509 bonds of one thousand dollars each, allowed at forty cents on the dollar, is two hundred three thousand six hundred dollars, ($203,600.) The interest thereon, from February 1st, 1857, to date hereof, at seven per
34 cent., is $65,321 67, (sixty-five thousand three hundred twenty-one dollars and sixty-seven cents.)

The real amount of the remainder of the said bonds, being 1,450 bonds of one thousand dollars each, numbered from two thousand five hundred and one to three thousand nine hundred and fifty, both inclusive, and one hundred bonds of five hundred dollars each, numbered from one to one hundred, both inclusive, allowed at forty cents on the dollar, is six hundred thousand dollars, ($600,000.) The interest thereon from February 1st, 1857, to the date hereof, at the rate of seven per cent., is $192,500, (one hundred ninety-two thousand five hundred dollars.)

Thus the real amount of all the said bonds is $2,794,000, on which the interest unpaid to the date hereof is $896,600 84.

We have also ascertained the amount of the judgment of Newcomb Cleveland, mentioned in the said order, which is now equitably owned by the defendant, Selah Chamberlain. The same was rendered on the seventh day of October, A. D. 1857, for damages, $111,627 71; costs, $544 15. And there was paid thereon, under the order of this court, April 22, 1861, in full of interest and costs to that date, the sum of $28,801 92.

The interest on the amount then due, at seven per cent., from that date to

| | |
|---|---|
| June 29th, 1861, is | $1, 455 56 |
| Adding principal | 111, 727 71 |
| The total due was | 113, 183 27 |
| Upon which date was paid | 10, 000 00 |
| Leaving due, June 29th, 1861 | 103, 183 27 |
| Upon which the interest to July 18th, 1861, at 7 per cent, is | 381 20 |
| The amount then due was | 103, 564 47 |
| Upon which date was paid | 20, 000 00 |
| Leaving due at that date | 83, 564 47 |
| On which interest to the date hereof is | 698 68 |
| The amount due at this date is | 84, 263 15 |

Eighty-four thousand two hundred sixty-three dollars and fifteen cents.

35 We have also ascertained the amount of a certain judgment, rendered in favor of Newcomb Cleveland against the La Crosse and Mil-

waukee Railroad Company, in the circuit court for Milwaukee County, on the twentieth day of April, A. D. 1859.

| | |
|---|---|
| There is due thereon at the date hereof damages and costs.. | $3, 718 60 |
| Interest to the date hereof..... | 614 60 |
| The amount due at this date is..... | 4, 333 20 |

We have also ascertained the amount of a certain other judgment, rendered in favor of Newcomb Cleveland against the La Crosse and Milwaukee Railroad Company, in the circuit court for Milwaukee County, on the twentieth day of April, A. D. 1859.

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|---|---|
| There is due thereon at the date hereof damages and costs.. | $1, 525 71 |
| Interest to the date hereof..... | 252 14 |
| The amount due at this date is..... | 1, 777 85 |

We have also ascertained the amounts of the judgments of Sebre Howard, mentioned in his answer filed in this cause. The amount of his judgment rendered in the said circuit court is included and embraced in the judgment rendered in his favor by this court (on the law side thereof) on the twenty-eighth day of November, A. D. 1859; on which last-named judgment there is due at the date hereof:

| | |
|---|---|
| Damages and costs..... | $16, 379 86 |
| Interest to the date hereof..... | 2, 013 39 |
| The amount due at this date is..... | 18, 393 25 |

We have ascertained the amounts of the judgments of the defendants (Graham and Scott,) mentioned in their answer, filed in this cause; the amounts of their judgments rendered in the said circuit court are included and embraced in the judgment rendered in their favor by this court (on the law side thereof) on the eleventh day of January, A. D. 1860, on which last-named judgment there is due at the date hereof:

| | | |
|---|---|---|
| 36 | Damages and costs..... | $44,413 18 |
| | Interest to the date hereof..... | 5,092 78 |
| | Amount due at this date..... | 49,505 96 |

We have inquired into and ascertained the amount of the several specific claims of the defendant, Selah Chamberlain, and have taken and stated an account of his receipts, set-offs, and credits, and of such as should be made to his claims, including his receipts of revenues of the whole road, without regard to its divisions by the mortgages; and we have examined the said Chamberlain under oath, and have required him to produce his books, which he has accordingly done, and we have taken additional testimony to that on file. The account of the said Chamberlain, comprising the said claims, (exclusive of the judgment rendered in favor of Newcomb Cleveland, first above mentioned,) presented to us on his behalf, is herewith returned, marked Schedule First. The paper marked Schedule Second, herewith returned, contains his account with the said La Crosse and Milwaukee Railroad Company, as allowed and stated by us, showing the amount of his several specific claims against the said company, as allowed by us, omitting the last-mentioned judgment, and also the items and amounts disallowed by us, and also showing the amounts of his receipts, set-offs, and credits, and of

such as should be made for his claims, including his receipts of revenues of the whole road; and showing also the balance due to him, including interest, at the date of this report, which balance we have ascertained to be four hundred eighteen thousand six hundred and sixteen dollars and seventy cents.

And we have made a separate statement as part of said Schedule Second, of the real and just amounts due on the second day of October, A. D. 1857, on account of the items of indebtedness included in the judgment of the said Selah Chamberlain, rendered on that date, and mentioned in the pleadings in this cause, showing that the true amount of such items of indebtedness was, at that date, five hundred sixty-eight thousand nine hundred seventy-five dollars and seventy-seven cents, ($568,975 77)

Of the several specific claims so allowed and stated in the said account is one under date of October 1st, 1858, for the moneys paid by the said Chamberlain, on and before that date, in the construction of the depot
37 building of the said company at La Crosse, to the amount of ..... $12,190 95
On which interest to this date is..... 2,489 00

Making the amount at this date..... 14,679 95

Which sum is secured to the said Chamberlain, who holds the title to the said building and the land on which it stands.

And another of the claims so allowed, under date of March 1st, 1853, is for moneys paid by the said Chamberlain to Jacob A. Hoover for a lot of land in the city of Milwaukee, crossed by the said railroad and used for its purposes, amounting to..... $3,236 52
On which interest to date is..... 566 38

Making the amount at this date..... 3,802 90

Which sum is likewise secured to the said Chamberlain, who holds the title to the said lot.

We have also ascertained the whole amount of rolling stock on the whole road at the cost price. The amount thereof was, at the date of the filing of the bill of complaint in this cause, five hundred sixty-nine thousand six hundred thirty-five dollars and seventy-eight cents, and an additional amount of fifty-three thousand six hundred dollars has been purchased since the filing of the bill of complaint, making the whole amount $623,235 78.

And we have ascertained, and do further report, that of the said rolling stock, forty box-cars, amounting, at the cost price thereof, to thirty-one thousand nine hundred and seventy-nine dollars and sixty-four cents, and numbered 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 40 , and 408, are covered by and included in the mortgage executed to the complainants as set forth in the bill of complaint in this cause, the said cars having been purchased, and by the proceeds of a portion of the bonds to which this mortgage is collateral, and all the remainder of the said rolling stock is covered by and included in the first mortgage upon the said railroad, and in the mortgage upon the said railroad executed to Greene C. Bronson and James T. Souter, and bearing date on the seventeenth day of August, A. D. 1857.

In ascertaining the facts and amounts, and in making the computations herein above contained and referred to, we have been guided by the

38 opinions and instruction of this court communicated to us in connection with the said order of reference.

All which is respectfully submitted.

Dated Milwaukee, 1st September, 1861.

WINFIELD SMITH.
JEROME R. BRIGHAM.
I. A. LAPHAM.

Filed Oct. 7, 1861.

40 EXHIBIT No. 5.

The district court of the United States for the district of Wisconsin, in equity.

GREENE C. BRONSON, JAMES T. SOUTTER, AND SHEPHERD Knapp, trustees,
*vs.*
THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY, Selah Chamberlain, and others, defendants.

Exceptions taken to the report of Winfield Smith, a master, and Jerome R. Brigham and Increase A. Lapham, special masters of this court, bearing date the first day of September, A. D. 1861, and filed on the seventh day of October, A. D. 1861, on the part of the defendant, Selah Chamberlain.

First exception. For that the said masters have not certified and allowed in their report the whole amount of the balance of account due to the defendant Chamberlain from the La Crosse and Milwaukee Railroad Company, as produced and proven before the said masters on the part of the said Chamberlain.

The items of said Chamberlain's account against said company, together with all sums of money received by him as partial payments or set-offs thereto, are stated in the paper annexed to the report of said masters, and marked "Schedule Third."

41 The evidence proving such account (exclusive of the times or periods when rests should be made on the proper dates, when the application of payments or set-offs should be made) is as follows:

Record of judgment in Chamberlain's favor, Oct. 2d, 1857. Testimony accompanying master's report, page 24.

Lease or mortgage to Chamberlain, and the contemporaneous agreement of Sept. 26, 1857. Testimony, page 79.

Also testimony submitted by defendant Chamberlain, and received at the hearing.

Depositions referring to pages of testimony returned by and referred to in master's report, as follows:

Edgar C. Jennings, p. 7 to 21; Dwight W. Keyes, p 21 to 42; Daniel L. Wells, p. 42 to 45; Royal D. Jennings, p. 45 to 47; Jno. M. Kimball, p. 49 to 50; William R. Sill, p. 50 to 53.

Proofs and exhibits relating to money paid Hoover, page 53, and exhibit returned marked No. 7.

Dwight W. Keyes, p. 53 to 54; A. G. Miller, jr., p. 54 to 57; Edwin H. Goodrich, p. 57 to 67; Selah Chamberlain, p. 67 to 79, and 83 to 91, 95 to 105.

Proofs and exhibits referred to on page 79, as Schedules A, B, C, and D, and on page 80 as F.

42 Exhibits referred to on page 82, marked No. 8 and 9.

The following depositions and exhibits thereto annexed, referred to on pages 82 and 83, and returned and marked "Exhibit No. 29:"

Charles S. Gregg, Thomas Daniel, Don J. Whittemore, Isaac C Brewer, John McLean Stoughton, William R. Sill, Moses Kneeland, Ezekiel W. Woodward; Dwight W. Keyes, pages 92 to 93; Henry L. Palmer, pages 106 to 116; Dwight W. Keyes, pages 115 to 123; E. H. Goodrich, pages 123 to 124; Daniel L. Wells, pages 126 to 130; Selah Chamberlain, pages 3c to 41c; Selah, Chamberlain, pages 49c to 51c.

Proofs referred to on pages 124 and 125 and exhibits No. 38 and 39.

Second exception. For that the said masters have, in stating and certifying the accounts of said Chamberlain against the said La Crosse and Milwaukee Railroad Company, inquired into the consideration of the judgment rendered in this honorable court, on the law side thereof, on the second day of October, A. D. 1857, in favor of said Chamberlain and against said railroad company. Whereas said judgment was and is conclusive as between said Chamberlain and the said railroad company and as against all parties to this suit.

(See page 10 of the master's report and the "separate statement"
43 there referred to as part of Schedule Fourth.)

Third exception. For that the said masters have certified in their report that the real amount which was due to said defendant Chamberlain, on the second day of October, A. D. 1857, on the items of indebtedness included in and which formed the consideration thereof, was the sum of $568,975 77, whereas they should have certified in such report that the real amount due to the said Chamberlain from said railroad company at the date of said judgment, and upon the items of indebtedness intended to be included therein, was the sum of $653,303 57. (See page 10 of the master's report, where they so certify, "and the separate statement" there referred to as part of Schedule Fourth.) And that the real amount of the indebtedness intended to be included in said judgment was the sum of $653,303 57, see Selah Chamberlain's testimony, reported by said masters and returned as part of their report, pages 67 to 79, 83 to 91, 95 to 105, 3c to 41c, and 49c to 51c; H. L. Palmer's, p. 106 to 116; depositions of Charles S. Gregg, Thomas Daniel, Don J. Whittemore, Isaac C. Brewer, John McLean Stoughton, William R. Sill, Moses Kneeland, and Ezekiel W. Woodward, referred to by masters in testimony by them returned on pages 82 and 83, as contained in Exhibit No. 29, accompanying repeport.

44 Fourth exception. For that the said masters have in such report certified and allowed as due to the defendant Chamberlain, on the said second day of October, 1857, and as forming part of the consideration of said judgment for "tunnel approach excavation," 24,653 cubic yards at $2 per yard, amounting to the sum of $49,306, whereas they should have certified and allowed 73,957.3 at $2 per cubic yard, amounting to the sum of $147,914 60. (See the 12th item contained in the "separate statement" report as part of Schedule Fourth.)

And that they ought to have certified and allowed 73,957.3 at $2 per cubic yard, amounting to the sum of $147,914.60, see all of the testimony, proofs, and exhibits referred to in the above third exception

Fifth exception. For that the said masters have in such report certified and allowed to the said Chamberlain interest on his said account at the rate of seven per centum per annum, whereas the said masters should have certified and allowed interest at the rate of twelve per centum per annum thereon. (See the lease or mortgage to Chamberlain and the contemporaneous agreement of 26th September, 1857, referred to by masters on the 79th page of testimony returned.)

45 Sixth exception. For that the said masters have in such report certified and allowed to the said Chamberlain upon his claim for moneys

paid by him on or before October 1st, 1858, in the construction of depot buildings at La Crosse, interest at the rate of seven per centum per annum, whereas they should have certified and allowed interest at the rate of twelve per centum per annum. (See lease from Spencer and Reynolds to Chamberlain, dated 29th July, 1859, and referred to as filed in the cause by the masters on page 50 of the testimony returned; also page 11 of the masters' report, where they report this item of Chamberlain's "special claims.")

Seventh exception. For that said masters have in such report allowed and certified to the said Chamberlain, upon his claim for moneys paid by him to Jacob A. Hoover for a lot of land in the city of Milwaukee crossed by the said railroad and used for its purposes, interest at the rate of seven per centum per annum, whereas they should have allowed and certified thereon interest at the rate of ten per centum per annum. (See proofs and exhibits relating to money paid by Hoover, page 53 of testimony, and exhibit returned marked "No. 7.")

46 Eighth exception. For that the said masters have not in such report allowed and certified in favor of and to the said Chamberlain any part of an item in his account, produced and proven before said masters, of two hundred thousand dollars, liquidated damages and interest thereon at the rate of twelve per centum per annum, and which item and claim for damages is fully mentioned and specified in the agreement reported by said masters as proven before them between the said Chamberlain and said railroad company, bearing date the twenty-sixth day of September, A. D. 1857. (See agreement contemporaneous with lease or mortgage, referred to on page 79 of testimony—copy as proven in testimony filed and used by Chamberlain at the hearing. See also Selah Chamberlain's testimony, on pages of testimony 87 to 91. )

Ninth exception. For that the said masters have not in such report allowed and certified in favor of and to the said Chamberlain the item in his account, produced and proven before said masters, of "loss on the steamer Keokuk," with interest thereon. (See Chamberlain's account, Schedule Third; account as allowed by masters, Schedule Fourth. See also Chamberlain's deposition; also deposition of E. H. Goodrich, pages 60 to 67.)

47 Tenth exception. For that the said masters have in such report stated and certified as the principal sum payable upon the mortgage bonds mentioned in the bill of complaint in this cause, being one thousand bonds of one thousand each, at fifty cents on a dollar, amounting to the sum of $500,000, whereas the said masters should have stated and allowed and certified in such report the said mortgage bonds at the principal sum of $1,000,000.

Eleventh exception. For that the said masters have in such report certified and stated that in ascertaining the facts and amounts, and in making the computations in such report contained and referred to, they had been guided by the opinions and instructions of the court, communicated to them in connection with the order of reference in said cause.

EMMONS, VAN DYKE & HAMILTON,
*Solicitors and of counsel for the defendant Selah Chamberlain.*

48 EXHIBIT No. 6.

*Order of court on the masters' report in western division foreclosure cause.*

UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

At a stated term of the district court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of

Milwaukee, in said district of Wisconsin, on the first Monday (being the sixth day) of January, A. D. 1862.

Present: The Honorable Andrew G. Miller, judge of said court, presiding.

On the second day of the said term, to wit, on the 7th day of January, A. D. 1862, the following proceedings were had:

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| Greene C. Bronson, James T. Soutter, and Shepherd Knapp, trustees, vs. La Crosse and Milwaukee Railroad Company, J. Albert Helfenstein, trustee, *et als.* | In equity. |

This day came the parties, by their counsel, and on consideration of the several exceptions to the report of the masters, and the arguments of counsel, it is ordered by the court that the first, second, and third exceptions of complainants to said report be, and hereby are, overruled.

49 And it is further ordered by the court that the fourth exceptions of complainants be, and is hereby, overruled as to the forty box-cars which are covered by this mortgage. And it is further ordered by the court that on said exception the said report be so modified that all the other rolling stock that was on said road when the receiver was appointed, except the said forty box-cars, is covered by and included in the first mortgage of the road from Milwaukee to Portage City; and that all the rolling stock on said road that has been purchased or procured since the court has held possession by its receiver, costing $147,943 62, be applied to the said first mortgage and the mortgage in this bill, in proportion to the net revenues on such portions of the road said mortgages respectively covered since the appointment of the receiver.

And it is further ordered by the court that the sixth and seventh exception of Selah Chamberlain to said report be, and hereby are, allowed; and that the tenth exception of said Chamberlain to said report be, and hereby is, overruled.

And it is further ordered that the remaining other exceptions of said Selah Chamberlain be held by the court for further consideration.

50 Exhibit No. 7.

United States of America, *District of Wisconsin, ss:*

At a stated term of the district court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the sixth day) of January, A. D. 1862. Present: The Honorable Andrew G. Miller, judge of said court, presiding.

On the sixth day of said term, to wit, on the thirteenth day of January, A. D. 1862, the following proceedings were had, to wit:

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| 51 | GREENE C. BRONSON, JAMES T. SOUTTER, AND SHEPERD Knapp, trustees,<br>*vs.*<br>LA CROSSE AND MILWAUKEE RAILROAD COMPANY, J. Albert Helfenstein, trustee, Selah Chamberlain, Newcomb Cleveland, Edwin Townsend, Franklin J. Blair, Edmund R. Persons, Leman Graham, Daniel D. Scott, Avery Hill, A. V. Rudd, E. Bradford Greenleaf, John H. Tesch, Dewitt C. Freeman, Ephraim Mariner, Thomas Turton, John Sercomb, Sebastian Knetzger, Frederick Lind, Edward H. Brodhead, Joshua Hathaway, William Gemmell, Charles Quentin, August Sauthoff, Sebre Howard, Lawrence G. Graham, Donald G. Scott, The Milwaukee and Minnesota Railroad Company, Moses M. Davis, James Wolstenholme, Guy Tracy, Horace Galpin, Edward Livermore, William Crawshay, Henry G. Gilbert, John Hardy, George W. Berrian, George Strobel, G. R. Van Allen, James G. Fulton, Moses A. Hoppock, Lereno Gaylord, C. Lewis Zimmerman, Daniel Goodwin, Stephen A. Dodge, Charles F. Deitz, William Wood, Benjamin F. Dawson, James W. Wood, John Wells, Ruric Martin, R. J. Barton, D. M. Corbell, D. Farnsworth, Harvey Terry, James J. Day, W. Catlin, Bruce & Young, John M. Trift, Jonathan P. Hopper, D. S. Kingore, Noah Sturdevant, William Fessenden, John L. Southland, E. Haskett Derby, Frederick Levick, Charles Shephard, C. P. Williams, Orville Oddie, John Pemberton, Niles Higgenbotham, George Ashley, William Gould, Nathan Marble, Jacob Van Vechten, John J. Vanderbilt, T. F. Bergen, G. S. Boardman, and John Nicholson. | In equity. |

This day this cause came on to be finally heard at this term, upon the bill taken as confessed against the defendants, La Crosse and Milwaukee Railroad Company, Newcomb Cleveland, Edwin Townsend, Franklin J. Blair, Edmund R. Persons, Avery Hill, A. V. Rudd, John H. Tesch, Dewitt C. Freeman, Ephraim Mariner, Thomas Turton, John Sercomb, Edward H. Brodhead, Joshua Hathaway, Charles Quentin, Lawrence G. Graham, Donald D. Scott, the Milwaukee and Minnesota Railroad Company, and Moses M. Davis, and upon the bill and the answers of the defendants, Selah Chamberlain, J. Albert Helfenstein, trustee, in a mortgage or deed of trust of said company, defendants, James Wolstenholme, Guy Tracy, Horace Galpin, Edward Livermore, William Crawshay, Henry G. Gilbert, John Hardy, George W. Berrian, George Strobel. G. R. Van Allen, James G. Fulton, Moses A. Hoppock, Lereno Gaylord, C. Lewis Zimmerman, Daniel Goodwin, Stephen A. Dodge, Charles F. Deitz, William Wood, Benjamin F. Dawson, James W. Wood, John Wells, Ruric Martin, R. J. Burton, D. M. Corbell, D. Farnsworth, Harvey Terry, James J. Day, W. Catlin, Bruce & Young, John M. Tuft, Jonathan P. Hooper, D. S. Kingore, Noah Sturdevant, William H. Fessenden, John L. Southerland, E. Haskell Derby, Frederick Levick, Charles Shepard, C. P. Williams, Orville Oddie, John Pemberton, Niles Higgenbotham, George Ashley, William Gould, Nathan Marble, Jacob Van Vechten, T. F. Bergen, John J. Vanderbilt, G. S. Boardman, and John Nicholson, and the

52 replications thereto and proof, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed by the court as follows, to wit: That the report of Winfield Smith, master, and of Jerome R. Brigham and Increase A. Lapham, special masters, appointed by this court, wherein the sum of six hundred and thirty-eight thousand seven hundred and seven-nine dollars and seventeen cents appears to be due to said complainants at the date of said report for interest on the bonds in the mortgage mentioned in this bill, numbered from one to nineteen hundred and ninety-one, both inclusive, and one million nine hundred and ninety-one thousand dollars for principal on the said bonds; and also sixty-five thousand three hundred and twenty-one dollars and sixty-seven cents for interest on five hundred and nine of the said bonds included in said mortgage, numbered from nineteen hundred and ninety-two to twenty-five hundred, both inclusive, and two hundred and three thousand six hundred dollars for principal of the sum; and also one hundred and ninety-two thousand five hundred dollars for interest on fourteen hundred and fifty of said bonds of one thousand dollars each, included in said mortgage, numbered from two thousand five hundred and one to three thousand nine hundred and fifty, both inclusive, and on one hundred of said bonds mentioned in said mortgage, of five hundred dollars each, and numbered from one to one hundred, both inclusive, and also six hundred thousand dollars of principal of said bonds—which said several sums of interest, amounting to eight hundred and ninety-six thousand six hundred dollars and eighty-four cents, and the amount of principal of said bonds is found to be two millions seven hundred and ninety-four thousand dollars, be, and hereby is, confirmed.

And it is further ordered, adjudged, and decreed by the court that all and singular the mortgaged premises mentioned in the bill of complaint in this cause and hereinafter described, or so much thereof as may be sufficient to raise the amount due the complainants for principal and interest, and the costs in this cause, (and which be sold separately without material injury to the parties interested as hereinafter directed,) be sold at public auction, under the direction of the marshal for this district, unless the mortgagor, previous to such sale, pay into court the said sum of eight hundred and ninety six thousand six hundred dollars and eighty-four cents, and interest thereon from this date, together with the costs in this cause to be taxed.

53 And it is further ordered that said sale be made at the post office in the city of Milwaukee, within this district, and that said marshal give public notice of the time and place of such sale by advertisement published in some newspaper in the city of La Crosse, and in the city of New York, once in each week for three months previous to the day of sale, and that the complainants, or the bondholders, or any of the parties to this cause, may become the purchaser thereof; and that the said marshal, after the confirmation of said sale by the court, execute a deed or deeds to the purchaser or purchasers of the mortgaged premises, and that the said marshal bring into court, for distribution among the bondholders and other lien creditors, the proceeds of said sale; and that the bonds secured by the mortgage described in this bill may be received in part payment of the proceeds of such sale, in the proportion as each bond at the principal thereof, for the amount thereof, according to this decree, (that is, the first nineteen hundred and ninety-one bonds at par, and the remainder at four hundred dollars on the thousand dollars,) bears to the amount of said sale.

And it is further ordered, adjudged, and decreed by the court that the defendant, and all persons claiming or to claim from or under them, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part and parcel thereof.

And it is further ordered, adjudged, and decreed by the court that the

purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof to the extent allowed and granted by the said mortgage.

The description of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to or from the bill of complaint in this cause, is as follows, viz:

All and singular the several tracts, pieces, or parcels of land which now are or may hereafter be or constitute the site of the roadway, turnouts, engine-houses, workshops, depots, and other buildings, and all the other lands and real estate which now constitute or may hereafter constitute or be a part of the roads of said railroad company from Madison, by way of Portage City, to the St. Croix River or Lake, between townships twenty-five and thirty-one, and from Portage City to La Crosse; and also all and singular the superstructure of said road, whether now made or to be made here-
54 after, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or pertaining to said roads, whether now built and made or to built and made hereafter. And also all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description, which have already been or may hereafter be procured for or used on said roads, or either of them, and all the materials, tools, implements, utensils, and other personal property, which have been or may hereafter be procured for or used in connection with said roads, or either of them. And also all and singular the rights, liberties, privileges, and franchises of said railroad company of every kind and description relating to said road.

Also "all and singular the lands granted or intended to be granted to said railroad company, under or by virtue of the act of Congress and the act of the legislature of Wisconsin hereinbefore mentioned, so far as the said lands pertain or are applicable to the construction of said roads from Madison, by way of Portage City, to the St. Croix River or Lake, estimated to be about one million of acres of land, together with all and singular the hereditaments and appurtenances belonging or in anywise appertaining to the lands and real estate hereby conveyed or intended to be conveyed; and it is hereby declared to be the intention of the parties to these presents to convey and to vest in said parties of the second part all the property, real and personal, of said railroad company, to be acquired hereafter, as well as that which has already been acquired, together with all the rights, liberties, privileges, and franchises of said railroad company, in respect to the roads above mentioned, as fully and amply as the same might be conveyed if the said railroads had already been fully constructed and equipped, and the particular lands granted by the foregoing act of Congress and the legislature, so far as the same are applicable to the construction of said road from Madison to St. Croix River or Lake, had already been designated and conveyed to said railroad company."

With forty box-cars numbered 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 268, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 292, 394, 396, 398, 400, 402, 404, 406, and 408, and such portion or share of rolling stock purchased and procured by the receiver, costing one hundred and forty-seven thousand nine hundred
55 and forty-two dollars and sixty-three cents, as the net revenues of the portion of road covered by this mortgage bears to the balance or other end of the road since the appointment of the receiver. The remaining rolling stock is subject to prior mortgages.

And it is further ordered by the court that the said described lands granted by the United States be first sold, and if the proceeds of the sale thereof shall be sufficient to pay and discharge the said sum of eight hun-

dred and ninety-six thousand six hundred dollars and eighty-four cents, with interest from this date and costs, or if the said sum be released or satisfied or paid into court, further proceedings under this decree shall be stayed. And if, at any time hereafter, there should be any default in the payment of any interest due on said mortgage, or of the sum of two million seven hundred and ninety-four thousand dollars, the principal thereof, when the same becomes due and payable at the time mentioned in said bonds and mortgages, the court may, upon petition of the complainants, or the holders of the said bonds, by a further order founded upon this decree, direct a sale of said mortgaged premises, or any part thereof, or of such part thereof as may not be previously sold under this decree, to be made under and in conformity to this decree as aforesaid, for the amount then so due, with the costs of such petition, and the subsequent proceedings thereon, and the same proceedings shall be had as often as a default shall be made.

A. G. MILLER.

Decree signed, recorded, and enrolled January 13, A. D. 1862.

J. M. MILLER, *Clerk.*

56 EXHIBIT No. 8.

JAN'Y 17, 1863.

This day came Isaac Seymour, Frederick P. James, and A. A. Cowdrey, by Messrs. Cary & Pratt, their counsel, and moved the court "to vacate the order *nisi* confirming the marshal's report of sale of the road, and also to vacate so much of said order as directs said lands to be resold on the twenty-fifth day of February next, bearing date January 5th, 1863, and also to vacate the sale of said road, and that the money paid into court on said sale be returned to said purchasers." Wherefore, it is ordered by the court that the whole of the said order of court, made on the first day of this term (the fifth day of January instant) overruling the exceptions to the sale of the road and appurtenances, and confirming said sale, and ordering the biddings upon the lands of the land grant to be opened, and the said lands to be again offered for sale and sold on the twenty-fifth day of February next, be, and hereby is, vacated and set aside. And it is further ordered that the sale of said road and appurtenances, and of the lands of the land grant, as reported by the marshal and the said report, be, and hereby are, vacated and set aside; and that the said report of sale, and all the proceedings subsequent thereto, be, and hereby are, vacated and set aside; and that the money paid into court as the proceeds of said sale be returned and paid back to the said
57 purchasers, to be receipted for by them, or their solicitors, Messrs. Cary & Pratt. And on the motion of the complainants, by their said counsel, it is ordered by the court that the mortgaged premises be advertised and sold by the marshal, according to the decree.

58 EXHIBIT No. 9.

*United States marshal sale.*

District court of the United States, district of Wisconsin.

GREENE C. BRONSON, JAMES T. SOUTTER, and SHEPHERD Knapp, trustees,
*vs.*
LA CROSSE & MILWAUKEE RAILROAD COMPANY, J. ALBERT Helfenstein, trustee, Selah Chamberlain, Newcomb Cleveland, Edwin Townsend, Franklin J. Blair, Edmund R. Persons, Leman Graham, Daniel D. Scott, Avery Hill, A. V. Rudd, E. Bradford Greenleaf, John H. Tesch, Dewitt C. Freeman, Ephraim
59 Mariner, Thomas Turton, John Sercomb, Sebastian Knetzger, Frederick Lind, Edward H. Broadhead, Joshua Hathaway, William Gemmell, Charles Quentin, August Sauthof, Sebre Howard, Lawrence G. Graham, Donald G. Scott, the Milwaukee and Minnesota Railroad Company, Moses M. Davis, James Wolstenholme, Guy Tracy, Horace Galpin, Edward Livermore, William Crawshay, Henry G. Gilbert, John Hardy, George W. Berrian, George Strobel, G. R. Van Allen, James G. Fulton, Moses A. Hoppock, Lereno Gaylord, C. Lewis Zimmerman, Daniel Goodwin, Stephen A. Dodge, Charles F. Deitz, William Wood, Benjamin F. Dawson, James W. Wood, John Wells, Ruric Martin, R. J. Burton, D. M. Corbit, D. Farnsworth, Harvey Terry, James J. Day, W. Catlin, Bruce & Young, John M. Tuft, Jonathan P. Hopper, D. S. Kingore, Noah Sturtevant, William H. Fessenden, John L. Sutherland, E. Haskell Derby, Frederick Levick, Charles Shepard, C. P. Williams, Orville Oddie, John Pemberton, Niles Higinbotham, George Ashley, William Gould, Nathan Marble, Jacob Van Vechten, T. F. Bergen, John J. Vanderbilt, G. S. Boardman, and John Nicholson. } In equity

In pursuance and by virtue of a decree made by the district court of the United States for the district of Wisconsin, on the thirteenth day of January, A. D. 1862, in the above-entitled cause, I shall sell at public auction, at the post office, in the city and county of Milwaukee, in said district, on the twenty-fifth (25th) day of April, A. D. 1863, at 2 o'clock in the afternoon, the following described mortgaged property, to wit: "all and singular the several tracts, pieces, or parcels of land which now are or may hereafter be
60 or constitute the site of the roadway, turnouts, engine-houses workshops, depots, and other buildings, and all other lands or real estate, which now constitute, or may hereafter constitute or be a part of the roads of said La Crosse and Milwaukee Railroad Company from Madison, by way of Portage City, to the St. Croix River or Lake, between townships twenty-five and thirty-one, and from Portage City to La Crosse; and also all and singular the superstructure of said roads, whether now made or to be made hereafter, and all the engine-houses, workshops, depots, and other buildings, and all other improvements on or pertaining to said roads, whether now built, or built or made hereafter; and also all and singular the locomo-

tive engines and other rolling stock, and all the equipments of every kind and description, which have already been or may hereafter be procured for or used on said roads, or either of them, and all the materials, tools, implements, utensils, and other personal property which have been or may hereafter be procured for or used in connection with said roads, or either of them; and also all and singular the rights, liberties, privileges, and franchises of said La Crosse and Milwaukee Railroad Company, of every kind and description, relating to said roads."

Also "all and singular the lands granted, or intended to be granted to said La Crosse and Milwaukee Railroad Company, under and by virtue of an act of the Congress of the United States, entitled 'An act granting public lands to the State of Wisconsin, to aid in the construction of railroads in said State,' approved June 3d, 1856, and under or by virtue of an act of the legislature of the State of Wisconsin, approved October 11th, A. D.
61 1856, entitled 'An act to grant certain lands to the La Crosse and Milwaukee Railroad Company,' and to execute the trust created by an act of Congress entitled 'An act granting public lands to the State of Wisconsin, to aid in the construction of railroads in said State,' approved June 3d, 1856, so far as the said lands pertain or are applicable to the construction of said roads from Madison, by way of Portage City, to the St. Croix River or Lake, estimated to be about one million of acres of lands, together with all and singular the hereditaments and appurtenances belonging or in anywise appertaining to the lands and real estate above mentioned and described." The rolling stock hereinbefore mentioned is to be sold, subject to the lien of mortgages executed prior to the 31st day of December, A. D. 1856, except forty box-cars numbered 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, 408, and except such proportion or share of said rolling stock purchased and procured by the receiver, costing one hundred and forty-seven thousand nine hundred and forty-two dollars and sixty-three cents, as the net revenue of the portion of railroad of the La Crosse and Milwaukee Railroad Company hereinbefore mentioned and described bears to the balance or other end of said road since the appointment of the receiver, which said forty box-cars and said proportion of rolling stock, purchased by the receiver, are to be sold, free and clear of any incumbrance whatever.

62 The lands hereinbefore mentioned as granted by the United States will be first sold, and if a sufficient sum shall not be realized therefrom to pay the amount adjudged to be due to the complainants for interest, together with costs, then the balance of the mortgaged property hereinbefore mentioned and described will be sold, and upon this sale the bonds secured by the mortgage described in the bill of complainant in this cause will be received in part payment of the proceeds of such sale in the proportion which each bond, at the principal thereof for the amount thereof according to this decree, (that is, the first nineteen hundred and ninety-one bonds at par, and the remainder at four hundred dollars on the thousand dollars,) bears to the amount of said sale.

DARIUS C. JACKSON, *U. S. Marshal.*

CARY & PRATT, *Solicitors for Complainants.*

Milwaukee, January 17, 1863.

64 EXHIBIT No. 10.

Circuit court of the United States for the district of Wisconsin.

JAMES T. SOUTTER AND SHEPARD KNAPP, SURVIVORS, &c., *vs.* THE LA CROSSE & MILWAUKEE RAILROAD COMPANY AND OTHERS. } In equity.

To the judges of the circuit court of the United States for the ninth circuit and district of Wisconsin, in equity:

Your petitioner, Alexander Fleming, a citizen of the State of New York, respectfully represents that he is the equitable owner of bonds numbered respectively 2020, 2021, 2022, 2023, 2024, 2314, 2315, 2441, 2442, 2443, 2444, and 2445, secured by the mortgage executed by the La Crosse and Milwaukee Railroad Company to James T. Soutter, Greene C. Bronson, and Shepherd Knapp, trustees mentioned and described in the bill of complaint of the complainants in this cause, and to foreclose which the said bill was exhibited in the district court of the United States for the district of Wisconsin, in equity; that a decree of foreclosure and sale was rendered in this cause by the said district court on the 13th day of January, A. D. 1862, and that under said decree the marshal of said district advertised the mortgaged premises for sale, under some form of notice, and pretended to sell the same,

65 together with other property not directed to be sold by said decree on the 25th day of April, A. D. 1863; that the said marshal had previously pretended to sell said mortgaged premises, and said other property, on the 4th day of October, A. D. 1862, and that said marshal reported the same to this court, and that this court set aside said sale of October 4th, 1862, and ordered, on the day of , A. D. 186 , that the marshal proceed to re-sell the mortgaged premises under said decreed, and that the sale by said marshal made as aforesaid on the 25th day of April, A. D. 1863, was pretended to be made in pursuance of said order of this court under said decree.

Your petitioner further shows that the said marshal has never made report to this court of his said sale of April 25th, 1863, and that the same has never been confirmed by this court, but that said sale remains unconfirmed and incomplete, as your petitioner is advised, for want of such confirmation of sale by this court; that the said marshal did pretend to report said sale to the district court of said district, and that said district court pretended to confirm the same on the 5th day of May, A. D. 1863; but your petitioner is advised and submits that the said district court never had any authority or jurisdiction over this cause after the 15th day of July, A. D. 1862, after the passage of the act of Congress, which became a law on that day repealing all the civil jurisdiction of said district court, and establishing this court; and that said report of sale and confirmation thereof to and by said district court were and are irregular and absolutely void.

Your petitioner further shows that, as he is informed and believes,

66 and as appears of record in this cause, the said complainants or their solicitors have never made application to this court to compel the said marshal to make report of said sale of April 25th, 1863, to this court, and do not intend so to do; that, on the contrary thereof, under color of the said unauthorized confirmation of said sale by the said district court the Milwaukee and St. Paul Railway Company is now in possession of the mortgaged premises and operating the same, pretending to be owners thereof, and that the solicitor of said complainants pretends in this cause, and gives out in arguments in this court, that the trust cast upon said complainants under and by virtue of said mortgage is fully performed, and

that said complainants are no longer subject to the orders of this court in said cause.

Your petitioner further shows to your honors, upon information and belief, that on or about the 25th day of October, 1861, one Henry E. Weed, who was then the owner and holder of said thirteen bonds, deposited the same with Isaac Seymour, Horace Galpin, Benjamin F. Dawson, Francis Vose, Frederick P. James, William Gould, and D. M. Hughes, as trustees, under and in pursuance of a certain plan or arrangement made and entered into by and between certain creditors of the La Crosse and Milwaukee Railroad Company, a copy of which is hereto attached and marked Exhibit No. [redacted] and that the said trustees issued to said Weed a certificate evidencing said deposit of said thirteen bonds, a copy of which certificate is hereto attached and marked Exhibit No. 2, and both of said exhibits are made part of this petition.

That about one year since your petitioner became the owner
67 equitably of said thirteen bonds by purchase from said Weed, and ever since has been and now is the owner thereof.

Your petitioner further represents that the said trustees under and by virtue of said trust were only authorized to use the same in the manner and for the purpose therein set forth and never had the same or any authority over the same, except as set forth in said document, copy of which is Exhibit No. 1, hereto attached, as your petitioner is informed and believes.

Your petitioner further represents that said trustees have not, nor has either of them, or any of them, used said bonds according to the true intent, meaning, or tenor of said declaration of trust; but have, on the contrary, as your petitioner is informed and believes, totally abandoned said trust, and now hold said bonds wrongfully, as against the true owners thereof, or have deposited the same in the said district court in pretended payment of the bid of William White and William W. Pratt, as hereinafter stated.

Your petitioner further shows that said White and said Pratt were declared the purchasers at said sale of the 25th day of April, A. D. 1863, and that they have never paid the sum bid by them therefor, as your petitioner is informed and believes; and that said thirteen bonds have never been paid; and that your petitioner is entitled, in default of the action of the complainants and their solicitors in that behalf, to move in said court in that behalf of his bonds, and on behalf of all other owners of bonds thus situated.

68 Your petitioner therefore humbly prays your honors to lay a rule upon the said marshal of said district, commanding him forthwith to report to the said circuit court said sale made or pretended by him to have been made on the 25th day of April, A. D. 1863, to the end that the same may be confirmed by order of this court, and the said purchasers be compelled to perform their said purchase and pay the amount bid by them, into said circuit court in cash, or that said sale may be set aside and a new sale be ordered under said decree.

A. FLEMING,
By MATT. H. CARPENTER,
*His Solicitor.*

DISTRICT OF WISCONSIN, *ss:*

Alexander Fleming, being first duly sworn, on oath says that he has heard read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters and things therein stated on his information and belief, and that as to those matters he believes it to be true.

A. FLEMING.

Subscribed and sworn to before me this 26th day of September, A. D. 1864.

JAMES McFARLIN,
*Commissioner cir. court U. S. dist. of Wis.*

69 *Exhibit No.* 1 *attached to Exhibit No.* 10.

Agreement between the assenting creditors of the La Crosse and Milwaukee Railroad Company, for the purchase of said road, and the organizing a new corporation for the benefit of the purchasers, made October 3d, 1861.

Whereas the subscribers to a plan for a "proposed basis for reorganizing the La Crosse and Milwaukee Railroad Company, dated September 3d, 1861, at a meeting regularly called and held October 1st, 1861, duly elected the undersigned, Isaac Seymour, Horace Galpin, Benjamin F. Dawson, Francis Vose, Fred. P. James, William Gould and D. M. Hughes, trustees and attorneys of the parties assenting to said plan or basis:

And whereas, the said parties at said meeting unanimously passed a resolution in the following words, viz:

"*Resolved*, That the trustees, or a majority of them, elected to carry into effect the plan of purchasing the La Crosse railroad, and of organizing a new corporation of the purchasers, with such modifications as they deem for our interest, are hereby authorized to purchase the whole or any part of the real or personal property of said railroad company, at any foreclosure or other sale that may be made of it, and to organize a new corporation with the usual powers and privileges of similar corporations, and to convey the premises so purchased to said new company; also to do any and all things pertaining to this matter, except to obligate us personally for the payment of money, which a majority of them deem for our benefit, as fully as we
70 might do if personally present; and they may add to their number, or fill any vacancies which may occur."

Now, therefore, in pursuance of the authority so conferred upon us, we do hereby declare and adopt this instrument as and for an agreement by and between the said creditors of the said La Crosse and Milwaukee Railroad Co., and all certificates, receipts, or other evidences given by us in exchange for bonds or other claims against said road are to be held subject to the provisions herein contained; and this agreement shall not be altered or modified except as provided in the 14th article hereof.

First. That said trustees, or a majority of them, are authorized *to purchase the whole or any part of the real or personal estate of the said railroad company*, and to convey the same to a new company to be formed for the benefit of the assenting bondholders and claimants, entitled to participate in the benefits of this agreement. Such sale and purchase to be made subject to all the liens, rights, and claims of the holders of any prior mortgage; and the said railroad and corporate property so purchased shall be held subject to the conditions and agreements herein contained and declared, and in trust for the benefit of the assentents hereto.

The said trustees or attorneys shall have power to advise with the trustees prosecuting the suits of foreclosure, and to give full direction from time to time in regard to said suits, or any other which may be brought affecting in any manner the rights or interest of the assentents, (and *generally*
71 *to do any and all things which they deem for the benefit of the assentents, as fully as they might do if personally present.* But this power is limited so that neither the said trustees or attorneys, nor their successors in the trust, nor any person under them, shall have power or authority to do any act or thing whereby any assentent shall become liable to pay any money

unless he shall hereafter give his written assent. Nor shall they have power to sell, hypothecate, or in any manner encumber the bonds, coupons, or other evidences of debt which may come into their possession or in any manner be under their control by virtue of this agreement.

Second. That said trustees, or a majority of them, shall, whenever in their judgment it will best promote the interest of said bondholders and claimants, organize a new corporation, on the following terms, limitations, and conditions, viz:

1st. That the name of the new corporation shall be "The Milwaukee and St. Paul Railway Company," of which there shall be nine directors, of whom one third shall be bondholders, one third preferred stockholders, and one third common stockholders.

2d. That the said company shall have no power to create any debts, except a new first mortgage not exceeding $4,200,000 in amount, including the amount of outstanding first mortgage bonds on the eastern division, at the time of organizing the new company, estimated at that time to be
72 about $886,000 and the Milwaukee City bonds secured by mortgage on the same property amounting to $314,000, unless the assent in writing of two thirds of the bondholders, and also two thirds of preferred stockholders shall be first had and obtained, authorizing the same; but this prohibition shall not apply to the assuming of any prior mortgage debts or liens which the road or property of the old company shall be incumbered by at the time of the purchase.

3d. That the preferred stock shall not exceed $2,000,000 exclusive of a sufficient sum to provide for the conversion of the said new first mortgage bonds, and in all shall not exceed $6,200,000. That it shall be entitled to a dividend of seven per cent. per annum, from the net earnings of each current year, after payment of interest on all the mortgage bonds, if the company earn so much during the current year, and before any payment of dividends to any other class of stockholders; if the net earnings of the company are not so much in any one year, then the said preferred stock shall receive for that year a dividend of whatever the said net earnings are after payment of interest on the mortgage bonds; and said preferred stock shall not have any claim upon the earnings of any other year for the non-payment of dividends of a preceding year.

4th. That the common stock to be issued shall not exceed the sum of $2,000,000 and until the company's net earnings are sufficient to pay
73 interest on all their mortgages, and a full dividend on their preferred stock, the said common stockholders shall not be entitled to vote upon their stock.

5th. That the mortgage deed of trust given to secure the bonds of the new company, and to be received by the assentents, shall be well and faithfully drafted and executed, so as to give them all the security for the payment of their bonds, principal and interest, that counsel learned in the law shall advise to be reasonable and proper for their security and protection. And it shall be a first and only mortgage on the whole road, franchises, and equipments, property, real and personal, of the company, and shall be made to secure the payment of $4,200,000 in bonds bearing interest at seven per cent. per annum, principal and interest payable in the city of New York, interest semi-annually, and the principal payable thirty years from the date of the mortgage.

The mortgage shall also contain a provision for a sinking fund for the payment of said mortgage bonds, by which the new company shall obligate themselves to pay to the trustees of said mortgage bonds all such sums of money as shall be derived from the sale of any lands which may have been or shall hereafter be donated or granted by either the United States or the

State of Wisconsin to aid in building this road, or that shall in any manner be acquired by said trustees, under this agreement, or by the new company,
by reason of the foreclosure and sale of any lands heretofore
74 mortgaged to secure the payment of any bonds held by parties assenting hereto. And said lands shall be fairly and equitably valued and classified by the trustees under this agreement, or by such persons as they shall appoint; and upon sale of said lands, said mortgage bonds may be received at par, and accrued interest in payment therefor, and the bonds thus received in payment shall be immediately cancelled by cutting out the signatures thereto. And said trust deed shall contain all other reasonable and proper provisions for making said lands the most productive and available to the company, as a sinking fund for the payment of said bonds.

The trustees of said mortgage shall, immediately after any payment is made them, designate by lot so many of the bonds as they have money to pay, to which the sum received by them shall be applied in payment. They shall give notice of the numbers of the bonds designated, in two or more newspapers printed in the city of New York; and after the first day of the succeeding January or July in each year; the interest on the bonds so designated shall cease, and neither the company or their successors shall be any longer liable for the payment of the interest or principal thereof. Said trustees shall, on said first day of each January and July, pay the principal and interest of said bonds, and cancel and surrender the same to the company, and also the the scrip certificate of stock accompanying said bonds.

75 The bonds thus to be issued and secured may have as a condition that in case of default of interest for six months, then the principal shall become due without demand or notice.

The bonds secured by said mortgage shall be convertible at the option of the holder into the preferred stock, at any time within ten days after and dividend shall have been declared and become payable on said preferred stock.

It shall be further provided, if the bondholders so elect, that the company shall issue, at the time of the delivery of each bond, ten shares of scrip stock in the preferred stock, for each $1,000 bond, and five shares for each $500 bond, the certificate of which shall be so framed as to accompany each bond, which stock may be voted upon at all stockholders' meetings, but shall not be entitled to receive any dividends until the bond represented therein shall be surrendered and cancelled; and the surrender of the bond shall be considered the payment for the stock. And should any further legislation be required to authorize the bondholders to vote in this or some other suitable manner, the trustees under this agreement, or the new company, as the case may be, shall apply to the legislature of Wisconsin in good faith to get the necessary authority.

The said trust deed shall also contain a provision requiring so many of
said $4,200,000 of bonds as are reserved for the first mortgage
76 eastern division, to be cancelled from time to time as the present sinking fund ($12,000 per annum) on said first mortgage eastern division bonds ($886,000) shall have cancelled of that mortgage.

Third. Such of the assentents to said basis as surrender to said trustees, upon their request, the bonds of said railroad company known as second mortgage eastern division bonds, dated Sept. 1st, 1857, and maturing Sept. 1st, 1870, shall receive the new mortgage bonds of said new company at par, for eighty per cent. of the principal of said bonds, and the said preferred stock for the remaining twenty per cent. of principal, and they shall remit in favor of said new company all interest accrued upon said bonds thus surrendered.

Fourth. Such of the assentents as surrender to said trustees, upon their request, the bonds of said railroad company known as first issue land grants, of $1,000 each, and numbered from 1 to 1991 inclusive, shall receive the new mortgage bonds of the new company at par for the principal of their bonds, and, for accrued interest, twenty-five per cent. upon the principal in said preferred stock, a proportional reduction to be made for over-due coupons not surrendered.

Fifth. Such of the assentents as surrender to said trustees, upon their request, the bonds of said railroad company known as medium issue land grants of $1,000 each, and numbered from 1992 to 2500, inclusive, shall receive the mortgage bonds of the new company at 40 per cent. of the
77 principal and the said preferred stock for 25 per cent. of the principal; the balance of principal and interest they shall remit in favor of said new company.

Sixth. Such of the assentents as surrender to said trustees, upon their request, the bonds of said railroad company known as the Helfenstein mortgage, shall receive for said bonds 40 per cent. in said preferred stock, and the balance of the principal and interest they shall remit in favor of said new company.

Seventh. Such of the assentents as surrender to said trustees, upon their request, bonds of said railroad company known as second issue land grants, the $1,000 bonds numbered from 2501 to 3950 inclusive, and the $500 bonds numbered from 1 to 100 inclusive, shall receive 40 per cent. of the principal in said common stock, and the balance of principal and interest they shall remit in favor of the new company.

Eighth. The farm mortgage stockholders of said railroad company may receive 80 per cent. of the full amount of their old stock in the common stock of the new company.

Ninth. The stockholders of the Milwaukee and Minnesota Railroad Company—except the farm mortgage stockholders of the La Crosse Company, who are provided for in the eleventh article hereof—if they transfer and
78 surrender their stock upon request of said trustees to them, shall receive twenty per cent. of their Milwaukee and Minnesota railroad stock in the common stock of the new company at par.

Tenth. It is expressly understood and agreed by all the parties in interest that said trustees shall have the power to audit, reject, or allow, either in whole or in part, any bonds or claims assented hereto before the issuing of any certificate therefor.

Eleventh. No party shall be considered as having any claim upon the said trustees, or to the benefits of this agreement, unless he or they shall surrender or assign to said trustees the bonds or claims held by said party against said railroad company, with all the unpaid coupons attached, previous to the sale of said road, or any part thereof, or whenever the trustees shall require the same by notice, duly advertised or by circular, for which they shall receive, in the first instance, a trustees' certificate or receipt therefor, payable to bearer and negotiable from hand to hand without endorsement; and whenever he or they shall be requested they shall surrender said certificate or receipt, and in lieu thereof, and in full satisfaction therefor, shall receive the mortgage bonds of the new company and the different classes of stock of the same, both at the par value thereof, as herein provided.

79 Twelfth. The trustees and attorneys appointed under this agreement shall not exceed seven in all, and they may resign their trust and position at any time; and in case of any resignation or vacancy, caused by death, removal, or other inability or incapacity to act, the survivors may fill the vacancy. The said trustees or attorneys shall keep a true record of all their acts and doings under this agreement.

Thirteenth. It is agreed by all the assentents that in carrying out any of the provisions of this agreement said trustees or *attorneys are hereby authorized, in relation to all matters, exigencies and things not herein specifically provided for, to exercise a liberal discretion in the premises*, and further, that a majority of said trustees or attorneys shall have power to act in all cases under this agreement.

Fourteenth. It is further agreed that upon the written recommendation of six of the seven trustees herein named, and placed before any regular or special meeting of the assentents duly called, at which a majority in interest (as the same may then be) of each class of mortgage bondholders or their assigns assenting hereto, shall be present and voting in the affirmative, it shall be competent for said meeting to alter or modify this agreement, or any part thereof, and thereafter this agreement shall have the same effect in law and equity as if said alterations or modifications had been duly incorporated herein; but no assenter hereto, or his legal representative, shall become liable to pay any money, except at his option, by any such action, unless he shall have voted therefor or assented thereto. At said meeting, and at all other meetings of the assentents hereto, each mortgage bondholder, having surrendered his bonds to the trustees herein named, shall be entitled to one vote for each $1,000 of the principal of the bonds surrendered.

80

Fifteenth. Annual meetings of the assentents hereto shall be held in the city of New York in the month of October in each year, which meeting shall be called by said trustees or attorneys, who shall specify the time and place for holding the same; and at such meeting, or at any special meeting duly called, they shall submit a full and specific statement of all their acts and proceedings under this agreement.

Sixteenth. It is agreed by all the assentents that the time within which mortgage bondholders and others can become parties to this agreement shall be limited to and include the first day of November, 1861, but this limitation may be extended by the trustees or attorneys elected hereunder if they deem it for the interest of the assentents so to do.

Notice shall be given, by advertisement or otherwise, of the general object of this agreement, and the time within which bondholders can become parties hereto, to the end that all parties interested in the road may have a reasonable opportunity to assent hereto and secure to themselves the benefits hereof.

81

ISAAC SEYMOUR.
HORACE GALPEN.
BENJAMIN F. DAWSON.
FRANCIS VOSE.
FRED. P. JAMES.
WILLIAM GOULD.
D. M. HUGHES.

*Recapitulation.*

A second mortgage eastern division bondholder gets first mortgage bonds for 80 per cent.; preferred stock for 20 per cent; in all, 100 per cent.

A land grant bondholder, low numbers (1 a 1991,) gets new 1st mortgage bonds at par, and, for interest, $250 preferred stock.

A medium No. land grant bondholder (Nos. 1992 a 2500) gets new 1st mortgage bonds for 40 per cent. of the principal, and $250 in preferred stock—in all 65 per cent.

A high No. land grant bondholder (2501 a 3950 of the $1,000 bonds and No. 1 a 100 of the $500 bonds) gets 40 per cent. in preferred stock and 40 per cent in common stock—in all, 80 per cent.

The office of the trustees is at 29 William street, city of New York, (room 4,) where they are prepared to receive the surrender of the bonds and attend to the duties of their trust.

N. A. COWDREY, *Secretary.*

82 *Exhibit No. 2, attached to Exhibit No. 10.*

No. 18 for medium issue 1992 a 2500 land grant first mortgage bonds issued pursuant to a plan dated September 3d, 1861, and to an agreement dated October 3d, 1861, for the purchase of the La Crosse and Milwaukee railroad, &c., and for the protection of the interest of certain assenting creditors.

Isaac Seymour, Horace Galpen, Benjamin F. Dawson, Francis Vose, Frederick P. James, William Gould, and D. M. Hughes, trustees, do hereby certify that, pursuant to said plan and agreement for purchasing the La Crosse and Milwaukee railroad and the real and personal property of that company, Henry E. Weed has deposited with said trustees thirteen (13) bonds of said company, known as the medium issue land grant first mortgage bonds, dated February 1st, 1857, and maturing February 1st, 1877, amounting to thirteen thousand ($13,000) dollars of principal, with unpaid coupons attached from February 1st, 1858, Nos. 2020, 2021, 2022, 2023, 2024, 2169, 2314, 2315, 2441, 2442, 2443, 2444, 2445, which bonds are to be used by said trustees in the purchase of said road, or any part thereof, at their discretion; and so much thereof as is not cancelled by said sale and purchase is to become the property of the company, to be farmed from or

83 by the purchasers of said road under the said agreement, whenever the new company are prepared to issue and deliver new bonds and stock, as set forth in said agreement.

This certificate, and the interest herein expressed, is issued, and is to be held and used, subject to the plan proposed in said basis of reorganization and said agreement, and thereunder entitles the said Weed, or bearer, upon its presentation and surrender, to a new mortgage bond of said new company for 40 per cent. of the bonds above surrendered, and to two and a half shares of preferred stock, of $100 each, in said company for each $1,000 bond.

| | |
|---|---|
| Representing amount in new bond | $5, 200 |
| Representing amount in preferred stock, 32 50 100 sh's | 3, 250 |
| Total | 8, 450 |

October 25th, 1861.

I. SEYMOUR, *Chairman.*

N. A. COWDREY, *Secretary.*

EXHIBIT No. 11.

September 29, 1854.—This day came the parties, by their counsel, and on consideration of the motion of A. Fleming, that the marshal make report of sale in this cause to this court, it is ordered by the court that the said motion be, and the same is hereby, overruled.

84 Supreme Court of the United States of America.

Ex parte: Alexander Fleming, in the matter of Soutter *et al.*, survivor, vs the La Crosse and Milwaukee Railroad Company and others.

Here in court comes Alexander Fleming, by Matt. H. Carpenter, his counsel, and in accordance with the petition herewith filed on his behalf, moves the court now here that a writ of mandamus, in due form, do at once issue

from this court, returnable on some certain day in the next term thereof, commanding the Honorable Samuel F. Miller, presiding judge of the circuit court of the United States for the district of Wisconsin, and the Honorable Andrew G. Miller, district judge of said district, also a judge of said circuit court, and the said circuit court to cause a rule to be laid upon the marshal of the United States for said district, commanding said marshal forthwith to report to the said circuit court the said sale mentioned
85 in said petition, made by him in pretended pursuance of the said decree mentioned in said petition, on the 25th day of April, A. D. 1863, to the end that the same may be confirmed by order of said circuit court, or that such other proceedings may be had thereon as shall be agreeable to equity and good conscience; or, on failure thereof, to show to said Supreme Court on the return day of said writ of mandamus why the same has not been done. And in case the court do not think fit to make such order, then the said Alexander Fleming, by Matt. H. Carpenter, his counsel, moves the court to grant a rule on the said judges of the said circuit court, requiring them to show cause, on some day certain in the next term of this court, why a peremptory writ of mandamus should not issue for the purpose above stated. And in support of this motion reference is made to the said petition and the exhibits thereto attached.

MATT. H. CARPENTER,
For ALEXANDER FLEMING.

Filed 16th January, 1865.

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# SUPREME COURT OF THE UNITED STATES.

*Ex-parte :* ALEXANDER FLEMING,

in the matter of

JAMES T. SOUTTER, SHEPHERD KNAPP, *Survivors, &c.*

*versus*

THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY, and others.

**Brief on motion for Mandamus to Report Sale.**

MATT. H. CARPENTER,

*of Counsel.*

SUPREME COURT OF THE UNITED STATES.

45

# SUPREME COURT OF THE UNITED STATES.

Ex-parte : ALEXANDER FLEMING,
In the matter of
JAMES T. SOUTTER and SHEPHERD KNAPP, Survivors, &c.,
*vs.*
THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY and others.

The above suit was commenced by bill of complaint, exhibited in the District Court, by Bronson, Soutter and Knapp, Trustees, to foreclose a mortgage given by the Railroad Company, to secure bonds to the amount of four millions dollars. Decree of foreclosure and sale was rendered in the District Court, January 13, 1862.

October 1, 1862, the suit was transferred to the Circuit Court by act of Congress.

12 Statutes at large, 576.

A sale was had after the suit was transferred to the Circuit Court ; was reported to the Circuit Court which set aside the sale, and ordered resale, which took place under the order of the Circuit Court, on the 25th April, 1863, but the Marshal has never made report of this sale to the Circuit Court.

Alexander Fleming, an owner of bonds secured by the mortgage, applied to the Circuit Court to grant a rule on the marshal to report this sale. This application was made after the decision of this Court, construing the acts of Congress upon this subject : Bronson vs. La Crosse Railroad Company, 1 Wallace, 405, and was denied upon the ground that a bond

holder, not a party, by name, to the suit, could not make it.

This is an application for *mandamus* to the Circuit Court to grant the rule on the marshal.

I.

It is the general rule that suits commenced by a trustee to foreclose a mortgage, or otherwise affecting the trust fund or property, must make all the beneficiaries however numerous parties to the suit.

West vs. Randall, 2 Mason 181, 186.
Hallett vs. Hallett, et. al, 2 Paige 15.
Fish vs. Howland, 1 Paige 23.

This case, however, falls within an exception to the rule, that where the parties are so numerous that they cannot conveniently be named, a suit may be brought by one or more, or by the trustee, *for the benefit of all.*

Beatty et. al vs. Kurtz, 2 Pet. 566.
Stevenson vs. Austin, 3 Met. 474.
Shaw vs. Norfolk Co. R. R. Co., 5 Gray 162.

In Shaw vs. Norfolk Co. R. R. Co. the Court holding that the trustee need not join the bond holders, say: "It is sufficient that the Court "have before them, those who are full representatives of the parties "beneficially interested in the property, *so that those interested will be* "*bound by the decree.*"

II.

Now, what relation to the suit do these bond holders sustain, whose interests will be bound by the decree? Are they parties or are they strangers? It is submitted that in all those cases where a few plaintiff's prosecute a suit on behalf of

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themselves and others, those who are represented by the plaintiffs, and bound by the decree, are in effect, parties to the suit; may rehear the cause, appeal from the decree, or apply to have it executed.

Story Eq. Pl., sec. 99 and notes.
Adair vs. The New River Co., 11 Ves. 444.
Gifford vs. Hort, 1 Sch. and Lef. 409.
Leigh vs. Thomas, 2 Ves. Sen. 312.
Joy vs. Wirtz, 1 Wash. C. C. 417.
Thompson vs. Brown, 4 J. Ch. 643.
Paxon vs. Douglas, 8 Ves. 520.
Ross vs. Crary, 1 Paige 417 and notes.
Meux vs. Maltby, 2 Swanst 277.
Good vs. Blewett, 13 Ves. 397.

In Adair vs. The New River Co., it is said of persons thus represented by others, "*in a sense they are before the Court.*"

In Thomas vs. Britnell, it is said: "No doubt but a bill may be by a "few creditors on behalf of themselves and the rest, to have an account "of real and personal estate, for relief of all; and then the decree lets "in all the others; *and they are considered as plaintiffs, &c.*"

In Joy vs. Wirtz, the Court say: to set aside a contract in which many creditors are interested, *all must be parties*, "either by name, *or as being represented by a part sueing in the name of all.*"

In Thompson vs. Brown and Paxon vs. Douglas, it is decided that after a decree in Chancery, upon a bill filed against an executor on behalf of all creditors, another creditor will be enjoined, on motion, without bill filed against him, from proceeding with action at law; and the reason given is that the decree *is in favor of all creditors*, and is in the nature of a judgment, in favor of the creditor who is prosecuting a suit at law.

Story Eq. Pl., sec. 99, speaking of persons represented by parties on the record, says: "*and under such circumstances they are treated as parties to the suit*;" and in Gifford vs. Hart it is said they may rehear the cause, or appeal from the decree, because they are bound by it, and must have a right to appeal as well as the persons against whom the decree was rendered [by name].

Story Eq. Pl. Sec. 157, says: "When an assignment is made by a

debtor for the benefit of his creditors, if any creditor seeks to enforce the trusts, he cannot sue alone; *but he must make all the other creditors*, provided for in the assignment, *parties*, either by name, *or by bringing the suit on behalf of himself and all the other creditors*, who may choose to come in and take the benefit of the decree."

Story Eq. Pl., sec. 158, speaking of the decisions holding that in certain cases all creditors should be made parties by name, adds; "Perhaps upon principle, it is not easy to see why it might not be sufficient, in such a case, to file the bill *on behalf of all the creditors and incumbrancers; thus making them all*, in a sense, *parties, to the extent of asserting their own rights* or of enabling them to contest the matter before a master.

These authorities establish the proposition, that persons thus represented are bound by the decree rendered, and may appeal from it. If Fleming could have appealed from a decree against him, it seems to require no argument to show that he could apply to the Court to execute the decree in his favor.

It was determined by the decree, that he was entitled to have and recover upon his bonds, a certain amount, and to have sale of the mortgaged premises. The sale is no sale without confirmation, and therefore his application was in effect, that the decree of the Court in his favor might be carried into execution. It is not essential that he should be a party to the record by name. He had a right under the decree, which the Court was bound to enforce. And a petition may be made by any person *interested in its subject matter*, whether a party to the record or not.

1 Barb. Ch. Pr. 579.

If *cestuis que trust* should not be made parties to the suit to which they were necessary parties, and their interests are apparent, a Court of Equity, to prevent delay, will allow them to bring forward their claims or rights by petition.

Wilford Eq. Pl. 73.

Drew vs. Harman, 5 Price 324,

Before the foreclosure suit was commenced, the bond holders could have applied to the proper Court to have the trustees removed for any neglect on their part. After suit brought, such proceeding is unnecessary, because the bond holders, the trustee and the mortgagor, are all before the Court, and all can have its protection.

It was the duty of the Marshal to report the sale of April 25, 1862, to the Circuit Court, and any person interested might apply to the Court for a rule to compel it; *provided* the Circuit Court from and after the sale, had jurisdiction of the cause.

In Bronson vs. La Crosse R. R. Co., 1 Wallace 405, this Court has settled the construction to be given to the act of Congress, creating the Circuit Court, and the supplemental act of March 4, 1863, authorizing the District Court to execute "final judgments and decrees."

12 Stat. at large, 576.

12 Stat. at large, 807.

This Court says, (p. 409.) that the act of March 4th, 1863, was designed to give the District Court power "necessary to regulate and control the ministerial duties of officers in the execution of final process;" and that "*if other powers, beyond the enforcement of the ministerial duties of the officer, in the execution of final process, become necessary, recourse must be had to the jurisdiction of the Circuit Court.*" And again: "We are also of opinion, that according to the true construction of the act," [March 4th, 1863,] the judgments and decrees there referred to, are those *disposing of the whole case; so that nothing is left to be done but to issue the final process;* that if any proceeding remains to be taken *for the purpose of completing the final disposition of it,* "the case or suit pending is not one within the provisions of the act. It belongs to the cognizance of the Circuit Court."

Now it is well settled, that the sale of mortgaged premises by the Marshal is of no effect, *until the sale be confirmed by the Court.*

Anderson vs. Foulke, 2 Har. and G. 346.
Cummings vs. McCullough, 5 Ala. 324.
Busy vs. Hardin 2 B. Mont. 407.

And this Court has decided that the confirmation of a sale in foreclosure cause, is a judicial act from which an appeal may be taken to the Supreme Court.

Orchard's case, not reported.
Blossom's case, 1 Wallace 655.

Therefore it is settled by the decision of this Court, that this suit belonged to the Circuit Court, for the purpose of ~~conferring~~ confirming the sale or taking any necessary step to complete the final ~~dispensation~~ disposition of the case.

The record also shows that the District Court, notwithstanding the decree of foreclosure and sale, reserved all the exceptions by Chamberlain to the Master's Report for further consideration. These exceptions involve over one hundred thousand dollars, and were undetermined both at the passage of the first and second acts, and remain undetermined to this day. Their determination involves the exercise of equitable jurisdiction; and from the order to be made, an appeal may be taken to the Supreme Court. The District Court had no jurisdiction to hear and determine any matter at issue in the suit, or necessary to the final disposition of the litigation, after the act creating the Circuit Court. And for this reason, as well as the one before given, this case was not remanded from the Circuit to the District Court, by the act of March 4th, 1863, as construed by this Court. 1 Wallace, 405.

III.

If Flemming was a proper person to make the application,

and it ought to have been granted by the Circuit Court, this Court will issue a mandamus, which will be in the nature of a *procedendo*, to compel that Court to grant the petition, and make an order upon the report of sale, ~~confirming~~ confirming or setting the sale aside.

Livingston vs. Dorgenois, 7 Cranch. 577,
Ex parta Bradstreet, 7 Pet 634.
Stafford vs. Union Bank, 17 How. 275.

IV.

If the Court should be of opinion, that for any reason, the writ prayed cannot be granted, we respectfully pray the Court to decide the questions of law involved in the application.

Ex parte Davenport, 6 Pet. 661.
Ex parte Whitney, 13 Pet. 404.
Bronson vs. R. R. Co., 1 Wallace 405.

MATT. H. CARPENTER,
*Counsel for Fleming.*

Nelson No. 5.

# SUPREME COURT OF THE UNITED STATES.

## EX PARTE: THE MILWAUKEE & MINNESOTA RAILROAD COMPANY.

APPLICATION FOR WRIT OF MANDAMUS, TO CIRCUIT COURT FOR THE DISTRICT OF WISCONSIN.

STARR & SON, Law Printers, Milwaukee, Wisconsin.

To the Honorable, the Justices of the Supreme Court of the United States of America:

Your petitioner, The Milwaukee and Minnesota Railroad Company, a corporation existing under the laws of the State of Wisconsin, respectfully showeth:

That on the 9th day of December, A. D. 1859, Greene C. Bronson and James T. Soutter, complainants, exhibited in the District Court of the United States, for the District of Wisconsin, their bill of complaint against the La Crosse and Milwaukee Railroad Company, your petitioner and others, defendants, to foreclose a certain mortgage, given to said complainants, as trustees, by the La Crosse and Milwaukee Railroad Company, dated the 17th day of August, A. D. 1857, to secure bonds of said Company to the amount of one million dollars, conveying to said complainants, the railroad from Milwaukee to Portage City, in said district, together with the rolling stock, appurtenances and franchises of said Company pertaining thereto: that such proceedings were thereupon had, that the said District Court rendered a final decree of foreclosure and sale in said cause, on the 13th day of January, A. D. 1862, from which decree, the said complainants, and your petitioner, appealed by separate appeals to the Supreme Court of the United States, which appeal of the said complainants, Bronson and Soutter, was cause No. 132 on the calender of the said Supreme Court, at the December term, A. D. 1863.

That the said Supreme Court, having fully and finally heard said cause on appeal, rendered and delivered its opinion and judgment, determining and declaring the rights of the respective parties in said cause; and on the 23rd day of February, A. D. 1864, issued its mandate thereon, to the Circuit Court of the United States, for the 9th Circuit and District of Wisconsin; copies of which opinion and mandate are hereto attached, and marked exhibit No. 1, and exhibit No. 2, respectively, in and by which mandate, among other things, the said Supreme Court directed and commanded the said Circuit Court, to ascertain the amount of monies in the hands of the Receiver or Receivers, from the earnings of the road covered by the mortgage to said complainants, which might be applicable to the discharge of the interest due on said mortgage, and apply it to the same; and that if the monies thus applied, should not be sufficient to discharge the interest due on said mortgage, on the first day of March, 1864, then, to ascertain the balance remaining due at that date, and in case such balance should not be paid within one year from the date of the order of the Court ascertaining it, then an order should be entered, directing a sale of the mortgaged premises, under the direction of the Court; and further, that the said Circuit Court, might pay out of the monies in the hands of the Receiver, or out of the proceeds, the taxed costs of the said complainants, in the proceedings for the foreclosure of the said mortgage not taxed and received from the defendants in

these proceedings; and also, such counsel fees in behalf of the said complainants, as the said Circuit Court in its discretion, might seem right to allow; and commanded said Circuit Court, that such execution and further proceedings, be had in said cause, in conformity to the opinion and decree of the said Supreme Court, as according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding, as by the record of said cause, remaining in said Supreme Court, (and to which your petitioner begs leave to refer,) will more fully and at large appear.

That at a stated term of said Circuit Court, held in Milwaukee in said District of Wisconsin, on the 2d Monday of April, A. D. 1864, to-wit: on the 19th day of April, A, D. 1864, the said James T. Soutter, survivor of said Greene C. Bronson, complainant in said cause, produced and filed in said Circuit Court, the said mandate of the said Supreme Court in said cause.

Your petitioner further shows that at the April term of the said Circuit Court, in A. D. 1864, after the filing of said mandate, your petitioner applied to said Court, in said cause for possession of the said Railroad to which it was entitled on payment of interest due in said cause, less the amount of funds in the hands of the Receiver in said cause applicable thereto, your petitioner then and there offering to pay the same within some short time to be fixed by said Court; but the said application was resisted by the counsel for the said complainant, and the Honorable Samuel F. Miller, presiding Judge of said Court, and the Honorable Andrew G. Miller, District Judge, and Judge of said Court differed in opinion as to the granting the prayer of said petition; and the said Honorable Samuel F. Miller then and there filed his written opinion therein, a copy of which is hereto attached and marked Exhibit No. 3. And afterward the said Andrew G. Miller published his opinion, a copy of which is hereto attached and marked Exhibit No. 4.

Your petitioner further shows that previous to the hearing and decision of said cause in the said Supreme Court the District Court of the United States for the District of Wisconsin, pretending to have jurisdiction over said suit although in fact the same was not pending in said District Court, but was pending in the said Circuit Court, to-wit: on the 12th day of June, 1863, made an order in said suit directing the Receiver to deliver possession of the said Railroad, Rolling Stock and Franchises to the said Milwaukee and St. Paul Railway Company to operate the same; and said last named Company immediatly thereafter in pretended pursuance of said order entered into possession of and commenced operating the same; and that after the decision of this Court upon your petitioners application for a writ of prohibition, at the last term of this Court to the effect that said suit was pending in the Circuit Court and not in said District Court and that the said order of said District Court on the 12th day of June, 1863, was *coram non judice* and void, the said Circuit Court made an order in said cause on the 28th day of April, 1864, vacating said order of the 12th June, 1863, and directing the said Milwaukee and St. Paul Railway Company to re-deliver to said Receiver the said railroad, rolling stock and franchises—the mortgaged premises in said suit; but the said Milwaukee and St. Paul Railway Company have never obeyed said order of April 28, 1864, but still continue in the actual operation of said premises under a pretended arrangement with said Receiver; as appears from an extract from the examination of the said Receiver in said cause,

Hans Crocker Esq. about the month of August, A. D. 1864, before H. L. Palmer Esq. auditor appointed by said Circuit Court to report on the said Receiver's accounts, which extract is hereto attached and marked Exhibit A.

Your petitioner further shows, that at the said April term of said Circuit Court, A. D. 1864, for the purpose of ascertaining the amount of monies in the hands of the Receiver or Receivers in said suit, from the earnings of the road covered by said mortgage, which might be applicable to the discharge of the interest due on said mortgage, as by the said mandate, the said Circuit Court was commanded to do, the said Circuit Court made an order in said suit, on the 28th day of April, A. D. 1864, as follows: "This day ordered by the Court, that the Receiver file in "this Court a continuous monthly account of his receipts and disburs- "ments, as Receiver, from the time of his appointment, including the re- "ceipts and disbursments of the Milwaukee and St. Paul Railway Com- "pany, from the 12th day of June, 1863, to the 1st day of June next, and "that H. L. Palmer, Esq., be and is appointed an auditor to report on the "same, to the next term of this Court."

Your petitioner further shows, that under the said order of reference to the said H. L. Palmer, your petitioner, the said Receiver, and the said Milwaukee and St. Paul Railway Company, by their counsel, appeared before the said H. L. Palmer, auditor as aforesaid, on the 30th day of July, A. D. 1864, to attend to the matters and things involved in said order of reference; and that the said Receiver exhibited to, and filed with the said Palmer, as auditor as aforesaid, three statements, copies of which are hereto attached and marked respectively, exhibit No. 5, exhibit No. 6 and exhibit No. 7; and that the said matters so referred to the said Palmer, continued on hearing before him, and were undetermined by him at the commencement of the September term of said Circuit Court, held in Milwaukee, in said District, on the 2nd Monday of September, A. D. 1864; and that in said last named term of said Circuit Court, the said matters referred to said Palmer, remaining undetermined, to-wit, on the eight day of October, A. D. 1864, the said Circuit Court, made an order in said cause, modifying the said order of reference to said Palmer, as follows, viz:

"It is ordered by the Court now here, that the order made in this "cause on the 28th day of April, A. D. 1864, requiring the Receiver to "render account, and referring it to H. L. Palmer auditor to report on "the same to the present Term of this Court, be, and the same is hereby "modified as follows:

"Ordered that Hans Crocker, Receiver file in the Office of the Clerk "of this Court, on or before the 20th day of November next, a detailed "account of his receipts and disbursements as Receiver from the 1st day "of June, to the 31st day of October, 1864, inclusive.

"That any of the parties to this cause may within ten days after such "account shall be filed, file exceptions thereto. That such account and "the exceptions thereto be referred to the auditor appointed in the said "order of the 28th day of April, 1864, to examine and report thereon in "like manner as upon the accounts and exceptions referred by said for- "mer order. That the auditor ascertain and report what should be charg- "ed for the use of rolling stock formerly used on said railroad as a part "of the accounts reported by him. That the auditor ascertain and re- "port what sum should be allowed to the receiver for his services and ex-

"penses as Receiver and whether the Receiver is subject to any and what "contingent liabilities growing out of his Receivership and the amount "and nature of each, and that said auditor report thereon with all conve- "nient speed and by the first Monday of March, A. D. 1865.

"That the Receiver also file with the Clerk of this Court on or before "the 20th day of March, 1865, an account of his receipts and disburse- "ments as Receiver from the first day of October, 1864, to the last day "of February, 1865, both inclusive. That any of the parties to this suit "may within five days after such account shall be filed, file exceptions "thereto, and that such last mentioned accounts and exceptions thereto, "be referred to H. L. Palmer, auditor appointed as aforesaid to examine "and report thereon by the first day of the next April term of this "Court."

And your petitioner further shows that the hearing of the said matters referred as aforesaid, remaining undetermined by said Palmer and it being impracticable to complete the same as by said last mentioned order was directed, the parties to said suit made and entered into a certain written stipulation before said Palmer, a copy of which is hereto attached and marked Exhibit No. 8.

And your petitioner further shows, that the said order of reference to said Palmer, is still open and continued by the orders and stipulations aforesaid, and the matters referred to him, remain as yet undetermined, and the said Palmer has, as yet, made no report to said Circuit Court.

Your petitioner further shows, that the said Circuit Court has taken no other steps or proceedings to ascertain the amount of monies in the hands of the Receiver or Receivers, from the earnings of the road covered by said mortgage, applicable to the payment of interest due on said mortgage, except the order of reference to said Palmer, and the order modifying the same; and that said Circuit Court, has not to this day, in any way whatever, ascertained the amount of monies in the hands of the Receiver or Receivers, from the earnings of the road covered by the mortgage, applicable to the discharge of the interest due on the mortgage, nor has the said Circuit Court made any order, applying the monies in the hands of the said Receiver or Receivers, to the discharge of said interest; nor has the said Court ascertained the balance of interest due on said mortgage, over and above the amount of monies in the hands of the Receiver or Receivers, from the earnings of the road covered by the mortgage, as in and by said mandate it was expressly and in words commanded to do.

Your petitioner further shows, upon information and belief, that a just and equitable accounting by the said Receiver, will show more money in his hands applicable to the payment of the interest due on said mortgage, than is now due thereon, and all costs, disbursments and counsel fees, which the said complainants are entitled to have and recover in said suit.

Your petitioner submits to your honors, that the said Receiver is liable, and must account for all monies received by the said Milwaukee and St. Paul Railway Company, from the earnings of the said mortgaged premises, the said Company being in possession thereof, and actually operating the same by permission of the said Receiver, in violation of the express legal orders of said District Court and said Circuit Court in said suit.

Your petitioner further shows, that at the said September term of said Circuit Court, A. D. 1864, your petitioner being desirous of paying into said Court, the whole amount of interest due the said complainants, together with costs, disbursments and expenses in his behalf, *less* the amount of monies conceded by the said Receiver, and the said Milwaukee and St. Paul Railway Company, to be in their hands, arising from the operation of said mortgaged premises, and showing to said Court, that the said Milwaukee and St Paul Railway Company admitted in its hands over one hundred and forty thousand dollars net revenues, arising from the mortgaged premises in said suit, and the report of said Receiver on file in said cause, a copy of which is hereto attached and marked exhibit No. 10, showing a balance in his hands of about sixty thousand dollars, exclusive of the said balance in the hands of the said Milwaukee and St. Paul Railway Company, making about the sum of two hundred thousand dollars in all, your petitioner applied to said Court for an order, directing the said Receiver to pay into Court the money in his hands that the same might be applied in payment of the interest due the complainants in said cause; as your petitioner claimed the mandate from this Court in said cause required said Circuit Court to do; but that the said judges of the said Court, differed and divided in opinion as to granting said application, and thereupon and for that reason, the same was denied by said Circuit Court; and the said Circuit Court at said term, and without ascertaining what balance of funds was in the said receiver's hands, applicable to the payment of the interest due the complainants, and without making any order applying such balance to the payment of said interest as directed by said mandate—did make an order or decree that there was due the complainants for interest in said cause, the sum of $105,290 5-100 dollars, and said order directed, that unless that sum should be paid within one year therefrom, that then, and in that case, the said premises should be sold; a copy of which said last named order, is hereto attached and marked exhibit No. 9, and the same was made by said Court without the consent, against the wishes, and notwithstanding the objection of your petitioner, then and there, and in open Court, made thereto.

Your petitioner further shows, that the record in Cause, No. 280, of the present term of said Supreme Court shows the proceeding in the said suit hereinbefore mentioned in the said Circuit Court from the filing of the said mandate in said Circuit Court as hereinbefore mentioned down to a day subsequent to the date of the order last hereinbefore mentioned, and your petitioner begs leave to refer to the same, and that the same may be taken and considered as a part of this petition.

Your petitioner further shows that it has no means of ascertaining the amount of moneys in the hands of the receiver applicable to the discharge of the interest due on said mortgage except through the proceedings of the said Circuit Court to be had according to the direction of the said mandate; and consequently has no means of ascertaining the balance which it ought to pay to discharge the interest due on said mortgage, together with costs, disbursements and counsel fee in the complain-

ants behalf, according to the opinion and decree of the said Supreme Court; but that your petitioner is desirous of paying, and expects and intends to pay, said balance into said Circuit Court in cash, as soon as the same shall be ascertained by said Circuit Court. And that the gracious ~~intention~~ of the Supreme Court to give your petitioner, under the circumstances of its case, one years time after said balance should be ascertained by said Circuit Court, to pay said balance, and thus prevent a sale of said mortgaged premises, will be entirely defeated; and said premises may be sold before said balance shall be ascertained or known, in direct violation of the plain language of the said mandate, unless the said Supreme Court interfere to protect your petitioner by issuing a writ of mandamus out of said Court in due form of law, to be addressed to the judges of the said Circuit Court, strictly commanding them to regard, obey and execute the mandate of said Supreme Court in said suit hereinbefore set forth.

Your petitioner further shows that unless said mandamus shall be issued as aforesaid, it believes and fears that at the September term of said Circuit Court, A. D. 1865, the said complainant will obtain an order at the foot of said decretal order hereinbefore last mentioned, directing a sale of said mortgaged premises; and that long before an appeal from said order of sale can be heard in the Supreme Court the said sale will take place, and the rights of your petitioner in said mortgaged premises be destroyed.

Therefore your petitioner respectfully prays your honors sitting in the said Supreme Court to order the writ of mandamus in due form to be at once issued from said Supreme Court, returnable upon some day to be named therein, commanding and requiring the Honorable Samuel F. Miller, presiding judge of said Circuit Court, and the Honorable Andrew G. Miller Judge of said Court, and the said Court to cause the said mandate to be carried into execution by ascertaining the amount of monies in the hands of the Receiver or Receivers, arising from the earnings of the road covered by said mortgage, which may be applicable to the discharge of the interest due on said mortgage and applying it to the same; and that if the moneys thus applied be not sufficient to discharge the interest due on said mortgage at the date of the order ascertaining the same, then, to ascertain the balance remaining due at that date and in case such balance is not paid within one year from the date of the order of the Court ascertaining it, that, then an order shall be entered directing a sale of the mortgaged premises under the direction of said Circuit Court; and commanding said Circuit Court and the judges thereof to vacate the said order hereinbefore last mentioned; or on failure thereof to show to the said Supreme Court on the return day of said writ of mandamus why the same has not been done and your petitioner will ever pray, &c.

The Milwaukee and Minnesota Railroad Company,

By MATT. H. CARPENTER,

[L. S.] *Its Counsel.*

DISTRICT OF WISCONSIN,—ss.

Austin Gunnison, being first duly sworn on oath, says, that the Milwaukee and Minnesota Railroad Company is a corporation existing under the Laws of the State of Wisconsin; that he is a member of the board of directors of said Company; that he has heard, read and knows the contents of the foregoing petition of said Company, and that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and that as to those matters he believes it to be true. That the exhibits attached to said petition and numbered from 1 to 10, inclusive, and the Exhibit marked A, are true copies of their respective originals.

AUSTIN GUNNISON.

Subscribed and sworn to before me this 31st day of December, A. D. 1864.

A. SCOTT SLOAN, Clerk of the Circuit Court of the United States for said District.

By J. McFARLIN, Deputy.

*Exhibit No. 1.*

# SUPREME COURT OF THE UNITED STATES.

No. 132,—December Term, 1863.

Greene C. Bronson & James T. Soutter Trustees, &c., Complainants and Appellants,
vs.
The La Crosse & Milwaukee Railroad Company; the Milwaukee & Minnesota Railroad Company, Selah Chamberlain, Henry Valette & al.

Appeal from the District Court of the United States, for the District of Wisconsin.

Mr. Justice NELSON delivered the opinion of the Court.

This is an appeal from a decree of the United States District Court of Wisconsin, possessing Circuit Court powers.

The complainants in the Court below, and appellants here, filed their bill to foreclose a mortgage, made on the 17th August, 1857, by the La Crosse and Milwaukee Railroad Company, covering a portion of their road, called the eastern division, which is about ninety-five miles in length. The mortgage was made to the complainants, as trustees, to secure the payment of bonds for one million of dollars, issued by the Company. These bonds were payable on the 1st September, 1870, at the Bank of the Republic, in the City of New York, with interest at the rate of eight per cent. per annum, payable semi-annually, on the first day of March and September in each year, and were all dated 1st September, 1857. They were registered and countersigned by the trustees and delivered to the Company, and have been negociated and put into circulation.

The bill further alleges, that default has been made in the payment of interest due on the 1st September, 1859, amounting to the sum of $40,000, and the complainants pray that the La Crosse and Milwaukee Railroad Company, and all other persons claiming under them, may be decreed to deliver over to them or their agents, and to put them in possession of, the railroad, with its appurtenances, &c.; and that all the income of said road may be applied to the payment of the monies due and to become due on the mortgage or bonds; and further, that the road with its appurtenances, may be sold, &c., and that, pending the proceedings, a receiver may be appointed. The bill was filed on the 9th December, 1859.

A decree pro confesso was taken against the La Crosse and Milwaukee Company, the mortgagors.

The Milwaukee and Minnesota Railroad Company were made defendants. This Company was formed upon a sale of the railroad in question, under a third mortgage made by the La Crosse and Milwaukee Company, junior to that of the complainants, bearing date, the 21st of June, 1858, together with a supplement to the same, dated 2nd July, of the same year, to secure an issue of bonds to the amount of two millions of dollars. This company did not appear, and permitted the bill to be taken as confessed.

Two of the stockholders of this Company, John S. Rockwell and A. Fleming, on an application to the Court below, were allowed to be made parties and to defend in the name of the Company, and each of them put in an answer.

The answer of Fleming sets up, in very general terms, that the bonds of the La Crosse and Milwaukee Company for the million of dollars were issued, and the mortgage of the road to the complainants, made, in violation of the charter of the Company, and in fraud of the stockholders and creditors, and then undertakes to set forth the particular instances of fraud on the part of the Company or of its officers and directors, in disposing of the bonds. That two hundred of the bonds were delivered to Selah Chamberlain in satisfaction of a pretended claim against the Company for a breach of contract, which he had entered into for building the road; that one hundred of the bonds were delivered to S. R. Foster, as security for a pretended indebtedness. That Soutter, one of the trustees, retained fifty-five of the bonds and refused to deliver them to the Company, and still holds them without having paid any consideration. That fifteen were delivered to Greene C. Bronson, the other trustee, in exchange for the stock of the Company, and that some six hundred were sold and disposed of by officers and directors of the Company at the nominal price of eighty cents on the dollar, forty cents in cash and forty cents in the bonds of the Company unsecured and valueless, or in their stock.

The defendant further states that one Prentiss Dow, who was an agent of the Company, received fourteen of the bonds for a sum less than one thousand dollars.

He then sets forth the circumstances attending the leasing of the road by the La Crosse and Milwaukee Company to Chamberlain, and the delivery of possession of the same, with its rolling stock and appurtenances, which it is not material to set forth in detail, except in one particular. According to the terms of the lease, Chamberlain bound himself after paying the interest and existing claims arising out of prior liens and incumbrances, to apply the net proceeds of the road to the accruing interest on the bonds secured by the mortgage to the complainants.

The defendant states that Chamberlain and the complainants or their agents combined to withhold the payment of the interest for the purpose and with the intent of forcing a sale of the road, and its appurtenances, under the mortgage, for the benefit of Chamberlain, that he might become the purchaser, and that the present suit was instituted in pursuance of this arrangement; that Chamberlain had funds in his hands, the proceeds of the road, to pay the interest coupons due the first September,

1859. The answer, then sets out the title of the Milwaukee and Minnesota Company under the foreclosure of the 3d mortgage, in detail, which it is not material to notice further.

The answer of Rockwell, the other stockholder, is substantially the same as that of Fleming.

Replications were filed to both answers.

As these two stockholders, though not made defendants by the bill, were permitted, by leave of the Court, to appear and put in answers in the name of the Milwaukee and Minnesota Company, it is material to enquire into the effect to be given to them. That they cannot be regarded as the answers of the corporate body is manifest, as a corporation must appear and answer to the bill, not under oath, but under its common seal. And an omission thus to appear and answer according to the rules and practice of the Court, entitle the complainants to enter an order that the bill be taken pro confesso. A further objection to the practice of permitting a party to appear and answer in the name of the corporation is the inequality that would exist between the parties to the litigation. The corporation not being before the Court, it would not be bound by any order or decree rendered against it, nor by any admissions made in the answer or stipulations that might be entered into by the parties or their counsel.

It is thus apparent, that while the name of the corporation is thus used as a real party in the litigation, so far as the rights and interests of the complainants are concerned, it is an unreal and fictitious party so far as respects any obligation or responsibility on the part of the respondents.

It is insisted, however, that the directors of this Company refused to appear and defend the bill filed against them, and for the fraudulent purpose of sacrificing the interests of the stockholders; and hence, the necessity, as well as the propriety and justice of permitting the defence by a stockholder in their name.

Undoubtedly, in the case supposed, it would be a reproach to the law, and especially in a Court of equity, if the stockholders were remediless. But in such a case, the Court in its discretion will permit a stockholder to become a party defendant for the purpose of protecting his own interests against unfounded or illegal claims against the Company; and he will also be permitted to appear on behalf of other stockholders who may desire to join him in the defence. But this defence is independent of the Company and of its directors, and the stockholder becomes a real and substantial party to the extent of his own interests and of those who may join him, and against whom any proceeding, order, or decree of the Court in the cause is binding and may be enforced. It is true, the remedy is an extreme one, and should be admitted by the Court with hesitation and caution; but it grows out of the necessity of the case and for the sake of justice, and may be the only remedy to prevent a flagrant wrong.

A complainant, if he chooses, may compel a corporation to appear and answer by a writ of distringas, or he may join with the corporation, a director, or officer if he desires a discovery under oath. But we are not aware of any other except a complainant who can compel an appearance or answer.

Now, although the appearance and answers of the stockholders, (Rockwel and Fleming,) were irregularly allowed by the Court, as each was permitted to appear and answer in the name of the company, yet, as the

defence set up is, doubtless, the same as that which they would have relied on if they had been admitted simply as stockholders, we are inclined to regard the answers the same as if put in by them in that character in the further views we shall take of the case. Each one swore to the truth of his answer in the usual way.

Before we enter upon an examination of the merits of the case, it will be proper to dispose of the cross bill filed by Fleming against the complainants.

This bill was filed in the name of the company alone, signed by their solicitors and counsel. The name of Fleming does not appear. And in addition to this, it appears that Fleming in his petition for leave to appear and answer the bill in the name of the company, also asked leave to file a cross bill. Leave was granted to put in the answer, but not to file the bill. The filing of it subsequently, therefore, was an irregularity for which the Court below very properly afterwards set it aside. The cross bill, so much relied on in the argument, is thus out of the case. In this connection we may as well refer to the answers of the judgment creditors, who were made parties defendants to the bill of complaint.

Sebre Howard recovered a judgment in the United States District Court, on the 28th November, 1859, against the La Crosse & Milwaukee R. R. Co. for the sum of $16,379.86; and Graham & Scott, a judgment in a State Court of Wisconsin, on the 25th November, 1857, against the same company for the sum of $29,820.71, and another judgment in the same Court, on the 21st September, 1858, for the sum of $11,188.15, and also a judgment against the same company in the United States District Court, on the 11th January, 1860, for the sum of $44,413. 18.

This latter judgment appears from the answer, as we understand it, to have been founded on the two previous judgments in the State Court.

Now it appears that each of these judgments were recovered after the date of the third mortgage of the La Crosse & Milwaukee Co. upon the foreclosure of which the Milwaukee & Minnesota Co. was formed. The liens of these judgments were subsequent to this mortgage, and were cut off by its foreclosure. Indeed, the judgment of Howard of November, 1858, and the last judgment of Graham & Scott, which was recovered in 1860, never were liens upon any interest in the road of the La Crosse & Milwaukee Co., the defendants in the judgments, as the equity of redemption had already passed to the purchaser under the sale to Barnes in the foreclosure of the third mortgage, and afterwards became vested in the Milwaukee & Minnesota Co.

These judgment creditors, therefore, according to their answers, have no interest in the subject-matter of this litigation.

We may add, that as replications were filed to the answers, the proof of these judgments should have been produced at the hearing. But the only proof of them that we have found in the record, is in a list of judgments annexed to the report of the master. They were material, and were put in issue by the replication.

These answers of the judgment creditors, being thus disposed of, the issues in the case are brought down to those raised by the answers of Rockwell and Fleming, in the name of the Milwaukee & Minnesota Co., which we have agreed to consider rather by indulgence than as matter of strict right, as the answers of the individual stockholders.

And this brings us to an examination of what may be called the merits of the case.

Before we take up the questions presented by these answers to the bill which bear upon the merits, it will be proper to refer to some matters there presented and very much discussed on the argument, which, in our judgment, should be laid entirely out of the case, as tending only to confuse and embarrass the real questions involved. We refer to those parts of the answers, which relate to the dealings between the La Crosse and Milwaukee Co., and Chamberlain, in which the complainants in this suit were not concerned, and with which they had no connection, as, for instance, the lease of the road to Chamberlain, and the allegations of fraud against him, and against the company in conducting the business of running the road under this lease. Also, in respect to other contracts between these parties in relation to the indebtedness of the company to Chamberlain, and to the building and completion of unfinished portions of the road, and equipping it with the rolling stock for use.

These relate to the dealings of the mortgagor, the La Crosse and Milwaukee Co., with a third person, over which the complainants, as mortgagees, had no control, and for which they were not responsible.

These dealings were subsequent to the execution and lien of the mortgage, and could not affect prejudicially the rights of the mortgagees. They had no interest in the earnings of the road, or concern in the appropriation of them, until the filing of the bill and the appointment of a receiver.

The only matters, therefore, set forth in these answers and in the proofs which have any bearing upon the merits, are:

1. The allegation that Chamberlain received from the La Crosse & Milwaukee Co. two hundred of the bonds secured by this mortgage fraudulently and without consideration.

2. That S. R. Foster received one hundred of the bonds in the same way.

3. That J. T. Soutter, one of the trustees, received fifty-five of them, and refused to deliver them to the Company.

4. That Greene C. Bronson, the other trustee, received fifteen for the stock of the Company.

5. That Prentiss Dow, an officer of the Company received fourteen for less than one thousand dollars.

And 6, That Chamberlain, who had covenanted in the lease of the road from the Company to apply the proceeds derived from the use of it to the payment of the interest accruing on the bonds, withheld the payment in pursuance of a fraudulent arrangement with the trustees, or with their agents, for the purpose of bringing about a foreclosure of the mortgage, that he might be enabled to purchase the road.

These are allegations that bear upon the merits of the controversy, and deserve to be considered. We shall not, however encumber this opinion with any very detailed explanation of them, but shall briefly refer to the proofs relating to each of these charges.

1. As to Chamberlain. It appears that he held a large claim for damages against the Company on account of their failure to fulfill contracts made with him to build the western division of the road. The work on the road was suspended by reason of this failure. And in the fall of 1857, upon the issue of the bonds of the Company, under this second mortgage,

an arrangement was entered into by the Company by which he received these two hundred bonds at fifty cents on the dollar towards payment of this claim.

2. As to S. R. Foster. He had loaned the Company over one hundred and fifty thousand dollars, and had taken their bonds as security, and, among others, the one hundred in question. It appears, that at a meeting of the board of directors, 24th May, 1858, the matter between them was adjusted by delivery of forty land grant bonds to Foster.

3. As to J. T. Soutter. The fifty-five bonds in controversy between him and the Company were settled, as appears by a receipt of their chairman and vice-president, on 14th September, 1858, by the delivery of other bonds to the Company.

4. As to Greene C. Bronson. He had purchased fifteen thousand dollars of stock, one hundred and fifty shares, from the Company, in the spring of 1857, and paid eighty cents cash on the dollar, the president at the time agreeing that the Company would re-purchase it at the same rate at any time thereafter, if he should wish to surrender it back. The Company was, doubtless, pressed for money at the time.

At a meeting of the board of directors, on the 2d of September, 1858, it was resolved that it would take into consideration the stock theretofore purchased by Judge Bronson, as he had rendered many services to the Company for which he had received no compensation; and afterwards, in September of the same year, it appears that the president of the Company, who had induced him to purchase the stock, received it back and delivered to him the fifteen bonds in question.

The truth of the case, therefore, is, that instead of receiving from the Company the money he had advanced for the stock according to their agreement, he received in place of it only bonds of the Company of less than half the value; and, as it appears, nothing for his legal advice and services.

5. As to Prentiss Dow. It appears that but thirteen bonds had been received by him, and for which he paid the Company at the time $11,400 in cash, stock and other bonds, and was afterwards engaged in its service as agent, settling claims against the Company.

In this connection it is proper to refer to the terms as published in a circular by the La Crosse & Milwaukee Co., and under which these bonds were negotiated and put into circulation.

This paper is dated Agust 10th, 1857. The company state, that the importance of completing the road this season to the junction of the western division, (sixty miles from Portage,) by which they would not only control the coming winter's travel of the Upper Mississippi, but receive over 300,000 acres, of the land grants, have determined the board of directors to place before the stock and bondholders extraordinary inducements to furnish the means; that the sum of $400,000 would be required. To obtain this sum, the Company now offer the holders of its stock and of unsecured bonds, a new issue of one million of 8 per cent. bonds, &c. The terms proposed are, to receive in payment for a bond of $1000, $400 in cash and the like sum in the stock or unsecured bonds of the Company. It was upon these terms that the directors went into the market in the City of New York and elsewhere, for the purpose of negotiating the bonds which now constitute the subject of litigation.

6. As to the charge of collusion of the complainants with Chamberlain

in the proceedings to foreclose the mortgage. This allegation is founded upon an agreement entered into with Chamberlain, on the 13th November, 1859.

At the time of this agreement he was in possession of the road and in the receipt of its earnings, and the obvious object of it on the part of the trustees was to procure the control of the net proceeds of its earnings, pending the proceedings of foreclosure.

For this purpose, Chamberlain agreed to deposit the whole of the earnings with the agent of the trustees, from day to day, and the trustees, on their part, agreed to appropriate them to the objects and uses provided for in the lease as the exigencies and proper working of the road might require. The trustees, in order to secure the fidelity of the officers and agents of Chamberlain, connected with the earnings of the road and the receipt of its revenues, stipulated for a supervision and control over these persons, and for the discharge of any of them from the service in case of a direliction of duty. They provided, also, for access to the books and papers relating to the revenues, management, and running of the road; also for the appointment of a receiver in case of the non-fulfillment of the agreement on the part of Chamberlain. These provisions were very important, as the revenues of the road, according to the terms of the lease, after covering running expenses and paying the interest on prior incumbrances, were to be applied to the discharge of the interest on these second mortgage bonds.

The interest then due on them amounted to $40,000. It was also agreed, that the proceedings of foreclosure should be conducted amicably, that is, no unreasonable opposition should be made to them by Chamberlain.

It was further agreed, that the sale should be made, if practicable, subject to the lease to Chamberlain, and that no opposition should be made to his purchase of the road at the sale under the foreclosure; but the trustees expressly reserved the right to bid at the sale for the protection of the bondholders. The trustees also agreed, that in case Chamberlain should become the purchaser, they would extend a credit of nine and twenty-four months upon so much of the interest as had become due. This is the substance of the agreement of which complaint is made.

It is supposed that the arrangement was entered into for the fraudulent purpose of enabling Chamberlain to purchase the road at the foreclosure sale, and thereby cut off subsequent incumbrances, and especially the rights and interests of the Milwaukee and Minnesota Co., formed under the third mortgage. But there is no evidence of this charge in the proofs, nor even of any previous dealings between the parties tending to this conclusion. They came together for the first time after the trustees had determined to foreclose the mortgage for default in the payment of interest, and finding Chamberlain in the possession of the road, and refusing to deliver it over to the trustees as provided for in the mortgage, but, on the contrary, insisting upon his right to run the same pending the legal proceedings, it is not strange that the trustees should have endeavored to arrange with him for a supervision and control in the mean time over the earnings and management of the road, and that he should forbear any unreasonable opposition to the foreclosure suit. And as to the provision relating to the purchase in case of a sale, there is nothing in it

interfering with any rights that belonged to the trustees, or to the prejudice of third parties, the judgment creditors, or company formed under the third mortgage. In a word, the arrangement was highly beneficial to the bondholders, represented by the trustees, and prejudicial to no one concerned in the foreclosure suit.

We shall not, however, dwell longer on this branch of the case; indeed, much that we have thus far said has been rather by way of explanation, and for the purpose of clearing it of matters and issues that do not belong to it, and have served only to confuse and embarrass its consideration.

In view of this object and purpose, we have referred to the two answers of the stockholders, Rockwell and Fleming, and have endeavored to separate the irrevelant matter from that which bore upon the merits, so as to confine the examination to the latter, namely to the charges against the validity of the bonds impeached of the number of some three hundred and eighty, in the hands, or which passed into the hands of five several individuals named, and have shown, as we think, by a reference to the proofs, that these charges are not well founded. The general and sweeping allegations against the other portion of the bonds, without specification or identity, we have not specially noticed. These charges are too general to be entitled to consideration, and the proofs relied on are as general and indefinite as the allegations.

We have also shown that the judgment creditors who appeared and answered have no interest in the matter in controversy; and lastly that the charges of a fraudulent collusion between the trustees and Chamberlain rests upon suspicion instead of upon proofs.

We now come to a branch of the case which presents a more conclusive answer to all the charges, whether in allegations or in proofs of the respondents, and overrides all other views that may or can be taken of them.

As we have seen, this third mortgage under which the Milwaukee and Minnesota company was formed, was executed and delivered to Barnes, the trustee, on the 22d June, 1858, to secure the payment of an issue of $2,000,000 in bonds, and a supplement to this mortgage was executed to the same trustee on the 11th August following.

These two mortgages, or rather one in two parts, were in express terms made *subject, among other incumbrances mentioned, to the bonds secured by a second mortgage on the eastern division of the road, to the amount of one million of dollars.*

Again, the bonds issued under this third mortgage, one of which is in the proofs, have an indorsement on the back as follows: "State of Wisconsin, La Crosse and Milwaukee Railroad Company, 3d mortgage sinking fund bond, seven per cent., &c.;" subject, among other things, "to a 2d mortgage on the same line of road of $1,000,000."

At the time this 3d mortgage was executed, and thus made subject to the 2d mortgage bonds, all these bonds had been negotiated by the company, and were in circulation in the business community. They were all negotiated in the months of September, October, November, and December, 1857. This the company, of course, well knew at the time of the execution of the third mortgage, and knew also of the circumstances attending the negotiation of them. They had received and were in the enjoyment of the avails of them, and with this knowledge and under

these circumstances the third mortgage and the bonds issued under it were made in express terms, subject to the payment and satisfaction of the bonds issued under the second. All persons, therefore, taking these third mortgage bonds, or coming in under the mortgage, took them and come in with a full knowledge that the mortgagor had made the security subject to the prior lien and indebtedness. Even if there had been any valid objections to these bonds under the second mortgage, it was competent for the obligor to waive them, and no better proof could be furnished of the waiver, than the acknowledgement of the full indebtedness, by making the subsequent security subject to it.

This was a question that belonged to the obligor to determine for himself when giving the third mortgage; but, besides this, what right have those coming in under it to complain? They come in with full notice of the acknowledgement of the indebtedness and previous lien, and especially what right have the Milwaukee and Minnesota Company to complain, who purchased the equity of redemption through Barnes, their agent, subject to the previous incumbrances of $1,000,000. They have had the benefit of that incumbrance by an abatement of that amount in the price of the purchase.

Without pursuing the case further, we are satisfied the decree of the Court below reducing the indebtedness of the La Crosse and Milwaukee Company to the bondholders is erroneous, and that the decision should have been for the full amount of one million of dollars and interest.

We have not noticed the appeal of H. Vallette, or of Chamberlain, as they defended simply as bondholders, and the question involved, therefore, the same as have been examined in the principal case.

We shall, therefore, reverse the decree and remit the cause to the Circuit Court of the United States for the District of Wisconsin, with directions to enter a decree for all the interest due and secured by the mortgage, with costs; that the Court ascertain the amount of moneys in the hands of the Receiver or Receivers from the earnings of the road covered by the mortgage, which may be applicable to the discharge of the interest and apply it to the same; and that if the moneys thus applied is not sufficient to discharge the interest due on the first day of March, 1864, then to ascertain the balance remaining due at that date, and in case such balance is not paid within one year from the date of the order of the Court ascertaining it, then an order shall be entered directing a sale of the mortgaged premises, under the direction of the Court, and on bringing the proceeds into Court, they shall be applied to the payment of the balance of interest; and if they exceed such balance, shall be applied to the future accruing interest down to the sale, and if they exceed that, to the principal of the bonds, in case the bondholders assent, or pro rata to thosewho may assent, and any remaining balance of the proceeds to be invested under the direction of the Court for the payment of future accruing interest, and ultimately theprincipal. And further, that in case the interest upon the bonds is paid without a sale, the decree shall remain as security for subsequent accruing interest, and ultimately for the principal.

And further, that the Court may pay out of moneys in the hands of the Receiver or out of the proceeds the taxed costs of the trustees in the proceedings for the foreclosure of the mortgage, not taxed and received from the defendants in those proceedings; and also such counsel fees in

behalf of the trustees, as the Court, in its discretion, may seem right to allow.

Mr. Justice CATRON.

I am decidedly of the opinion that it was irregular and erroneous in the Court below, to let in the volunteer defendants, Fleming and Rockwell; because to let in stockholders at their discretion, must lead to great complication and confusion in chancery practice; and which is new in the Federal Courts. In other respects, I concur with the principal opinion, and in the decree therein ordered.

EXHIBIT No. 2

# MANDATE.

UNITED STATES OF AMERICA,—ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, To the Honorable the Judges of the Circuit Court of the United States, for the District of Wisconsin,

(Seal.)

*Greeting:*

Whereas lately in the District Court of the United States for the District of Wisconsin, in a cause between Greene C. Bronson and James T. Soutter, Trustees Complainants, and the La Crosse and Milwaukee Railroad Company, the Milwaukee and Minnesota Railroad Company, Selah Chamberlain, Sebre Howard, Conrad Wellauer, Edward H. Bredhead, Newcomb Cleveland, William Gemmel, Joshua Hathaway, James Wolstenholme, Edwin C. Litchfield, Ebenezer Higgins, George R. Mowry, Henry K. Eastman, Henry L. Simonds, Dewitt C. Freeman, E. Bradford Greenleaf, Frederick Lind, Sebastin Knetzger, Lawrence G. Graham, Donald D. Scott, Thomas Turton, John Sercomb, Ephraim Mariner, Avery Hill, A. V. Rudd, Franklin J. Blair, Edmund R. Persons, Philip S. Justice, Elkanah Cobb, John V. Bean, Philip Wilson, J. Howard Mitchel, Edwin Townsend, The Mercantile Bank of Hartford, Conn., August Lauthoff, Charles Quentin, John H. Tesch, Byron Kilbourn, Nathaniel S. Bouton, The Juneau Bank, The Milwaukee, Watertown and Baraboo Valley Railroad Company, Cicero Comstock, George W. Chapman, Moses M. Davis, Charles Howard and Henry Valette, Respondents, the decree of the said District Court was in the following words, viz:

"It was ordered, adjudged and decreed by the Court as follows, to-wit: That the report of Winfield Smith, Jerome R. Brigham and Increase A. Lapham, masters appointed by this Court, wherein the sum of sixty-five thousand two hundred and sixty dollars and five cents appears to be due to the said complainants at the date of said report, upon the bonds and mortgage in said bill mentioned for interest, and five hundred thousand dollars for the principal of said bonds, be and is hereby confirmed.

"It is therefore further ordered, adjudged and decreed, and this Court doth hereby order, adjudge and decree, that all and singular the mortgaged premises mentioned in the bill of complaint in

this cause and hereinafter described, or so much thereof as may be sufficient to raise the amount owing to the complainants for the several bondholders for principal, interest and costs in this cause, be sold at public auction under the direction of the marshal for this district, unless said mortgagor, the La Crosse and Milwaukee Railroad Company, or some one on its behalf, previous to such sale, shall pay the said sum of sixty-five thousand, two hundred and sixty dollars and five cents and interest thereon from this date, together with the costs in this cause to be taxed.

"And it is further ordered that said sale be made at the post office in the city of Milwaukee, within this district where said premises are situated; and that the said marshal give public notice of the time and place of such sale by advertisement published in some newspaper printed in said city and in the city of New York, at least once in each week, for three months previous to the day of sale; and that said complainants or any of the parties to this cause, may become the purchaser thereof; and that said marshal execute a deed or deeds to the said purchaser or purchasers of the mortgaged premises; and that said marshal pay to said complainants or their solicitors, out of the proceeds of such sale, their costs in this cause to be taxed, and that he bring the moneys arising from such sale, into court for the several bond holders without delay, to abide the further order of the Court.

"And it is further ordered by the Court that the bonds included in the mortgage may be received in payment of said purchase at the rate of fifty cents on the dollar, in proportion that each bears to the amount of the sale.

"And it is further ordered, adjudged and decreed, that the defendants and all persons claiming, or to claim, from or under them be forever barred or foreclosed of and from all equity of redemption and claim of, in and to, said mortgaged premises, and every part and parcel thereof.

"And it is further ordered and decreed that the purchaser or purchasers of said mortgaged premises at such sale, be let into such possession thereof, as the said mortgage entitles them to, and that any of the parties to this cause who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this cause, has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers on production of the deed of said premises and a certified copy of the order confirming the report of sale in this cause.

"And it is further ordered and decreed by the Court that upon the payment into Court of the said sum of sixty-five thousand two hundred and sixty dollars and five cents with interest from this date, and the costs taxed and such interest as may become payable on the bonds in the meantime, further proceedings under this decree shall then be stayed. And if at any time hereafter there should be any default in the payment of any interest due on said mortgage, or of the sum of five hundred thousand dollars the principal thereof, when the same becomes due and payable

at the times mentioned in the said bonds and mortgage, the Court, may upon petition of the complainants or the holders of said bonds, by a further order founded upon this decree, direct a sale of said mortgaged premises to be made under and in conformity to this decree as aforesaid, for the amount then so due, with the costs of such petition and the subsequent proceeding thereon, and the same proceedings shall be had as often as a default shall be made.

"The description of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to or from the bill of complaint in this cause, is as follows, viz:

"'All and singular the railroad of said Company, commencing in the city of Milwaukee and running thence to Portage City, a distance of ninety-five miles, which road has been constructed and is now in full operation; and also the railroad of said company (as well that part which has been constructed as that part which remains to be constructed,) from Watertown, by the way of Columbus, to Midland, (where it connects with the main line of the railroad of said company,) a distance of forty miles, one half of which last mentioned road, being the part between Watertown and Columbus, has been constructed and is now in full operation, including all and singular the several tracts, pieces or parcels of land which now are, or may hereafter be, or constitute the site of the roadways, turnouts, enginehouses, workshops, depots and other buildings, and all the other land and real estate which now constitute or may hereafter constitute or be a part of or appertain to said railroads, or either of them. And also all and singular the superstructure of said railroads, whether now made or to be made hereafter, and all the engine houses, workshops, depots and other buildings, and all the other improvements on or appertaining to said railroads, or either of them, whether now built or made, or to be built and made hereafter.

"'And also all and singular the locomotive engines, and other rolling stock, and all the other equipments of every kind and description which have already been or may hereafter be procured for or used on said Railroads or either of them; and all the materials, tools, implements and utensils, and other personal property which have been or may hereafter be procured for or used in connection with said railroads or either of them.

"'And also all and singular the rights, liberties, privileges, and franchises of said railroad company, so far as they relate to said railroads, from Milwaukee to Portage City, and from Watertown, by the way of Columbus, to Midland, aforesaid.

"'And it is hereby declared to be the intention of the parties to these presents to convey to and vest in said parties of the second part, all the property, real and personal, of said railroad company, to be acquired hereafter, as well as that which has already been acquired, together with all the rights, liberties, privileges and franchises of said railroad company in respect to said rail-

roads from Milwaukee to Portage City, and from Watertown by the way of Columbus, to Midland, as fully and amply as the same might be conveyed if said railroads had already been fully constructed and equipped. Said railroad from Milwaukee to Portage City is subject to a first mortgage on the same of ten thousand dollars per mile, amounting in the aggregate to nine hundred and fifty thousand dollars; the first eighteen miles of said road from Milwaukee, westward, is subject to a second mortgage of one hundred and fourteen thousand dollars; and the next forty miles of said road, westward of the eighteen miles, is subject to a second mortgage of two hundred thousand dollars.

"But it is further ordered that the marshal do not sell all that part of said mortgaged premises as are embraced in the description, and relating to the railroad from Watertown, by way of Columbus, to Midland aforesaid, unless the sale thereof should, in the opinion of the court, be necessary and be required for the payment of the amount of the bonds and mortgage mentioned in this bill as settled by this decree, together with the previous liens on the premises described in said mortgage.

"And it is fruther ordered by the court that the sale of the premises described in said mortgage and in this bill as the railroad and appurtenances from the City of Milwaukee to Portage City be made subject to the mortgages and liens mentioned therein.

"And it is further ordered by the court that the sale of said mortgaged premises be made irrespective of and without regard to any claim or interest of the defendant, Ephraim Mariner, to the same or any part thereof"—As by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States, by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appear.

And whereas, in the present term of December, in the year of our Lord one thousand eight hundred and sixty-three, the said cause came on to be heard before the said Supreme Court, on the said transcript of the record, and was argued by counsel:

*On consideration whereof*, it is the opinion of this Court that the decree of the District Court reducing the indebtedness of the La Crosse and Milwaukee Railroad Company to the bond holders is erroneous, and that the decision should have been for the full amount of one million of dollars and interest.

It is therefore now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be and the same is hereby reversed with costs, and that the said complainants, Greene C. Bronson and James Soutter, trustees, &c., recover against the said respondents, the La Crosse and Milwaukee Railroad Company, et. al., two hundred and sixty-one dollars and seventy-one cents for their costs herein expended, and have execution therefor.

And it is further ordered that this cause be and the same is hereby remanded to the Circuit Court of the United States for

the District of Wisconsin, with directions to enter a decree for all the interest due and secured by the mortgage, with costs.

That the Court ascertain the amount of monies in the hands of the receiver or receivers from the earnings of the road covered by the mortgage, which may be applicable to the discharge of the interest, and apply it to the same, and that, if the moneys thus applied is not sufficient to discharge the interest due on the first day of March, 1864, then, to ascertain the balance remaining due at that date, and in case such balance is not paid within one year from the date of the order of the Court ascertaining [illegible] order shall be entered directing a sale of the mortgag[illegible] under the direction of the Court, and on bringing t[illegible] into Court, they shall be applied to the payment of t[illegible] of interest, and if they exceed such balance, shall be the future accruing interest, down to the sale, and if th[illegible] that, to the principal of the bonds, in case the bond-holders assent, or pro rata to those who may assent, and any remaining balance of the proceeds to be invested under the direction of the Court, for the payment of future accruing interest, and ultimately the principal. And further, that in case the interest upon the bonds is paid without a sale, the decree shall remain as security for subsequent accruing interest, and ultimately for the principal. And further, that the Court may pay out of the monies in the hands of the receiver, or out of the proceeds, the taxed costs of the trustees in the proceedings for the foreclosure of the mortgage, not taxed and received from the defendants in these proceedings. And also, such counsel fees in behalf of the trustees, as the Court, in its discretion, may seem right to allow. 23d Feb.

You therefore are hereby commanded that such execution and further proceedings be had in said cause, in conformity to the opinion and decree of this Court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Hon. Roger B. Taney, Chief Justice of said Supreme Court, the first Monday of December in the year of our Lord one thousand eight hundred and sixty-three.

Costs of complainant:

Clerk, $241 71.
Attorney, 20 00.

$261 71. Taxed by

D. W. MIDDLETON,

*Clerk of the Supreme Court of the United States.*

roads from Milwaukee to Portage City, and from Watertown by the way of Columbus, to Midland, as fully and amply as the same might be conveyed if said railroads had already been fully constructed and equipped. Said railroad from Milwaukee to Portage City is subject to a first mortgage on the same of ten thousand dollars per mile, amounting in the aggregate to nine hundred and fifty thousand dollars; the first eighteen miles of said road from Milwaukee, westward, is subject to a second mortgage of one hundred and fourteen thousand dollars; and the next forty miles of said road, westward of the eighteen miles, is subject to a second mortgage of two hundred thousand dollars.

"But it is further ordered that the marshal do not sell all that part of said mortgaged premises as are embraced in the description, and relating to the railroad from Watertown, by way of Columbus, to Midland aforesaid, unless the sale thereof should, in the opinion of the court, be necessary and be required for the payment of the amount of the bonds and mortgage mentioned in this bill as settled by this decree, together with the previous liens on the premises described in said mortgage.

"And it is fruther ordered by the court that the sale of the premises described in said mortgage and in this bill as the railroad and appurtenances from the City of Milwaukee to Portage City be made subject to the mortgages and liens mentioned therein.

"And it is further ordered by the court that the sale of said mortgaged premises be made irrespective of and without regard to any claim or interest of the defendant, Ephraim Mariner, to the same or any part thereof"—As by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States, by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appear.

And whereas, in the present term of December, in the year of our Lord one thousand eight hundred and sixty-three, the said cause came on to be heard before the said Supreme Court, on the said transcript of the record, and was argued by counsel:

*On consideration whereof*, it is the opinion of this Court that the decree of the District Court reducing the indebtedness of the La Crosse and Milwaukee Railroad Company to the bond holders is erroneous, and that the decision should have been for the full amount of one million of dollars and interest.

It is therefore now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be and the same is hereby reversed with costs, and that the said complainants, Greene C. Bronson and James Soutter, trustees, &c., recover against the said respondents, the La Crosse and Milwaukee Railroad Company, et. al., two hundred and sixty-one dollars and seventy-one cents for their costs herein expended, and have execution therefor.

And it is further ordered that this cause be and the same is hereby remanded to the Circuit Court of the United States for

the District of Wisconsin, with directions to enter a decree for all the interest due and secured by the mortgage, with costs.

That the Court ascertain the amount of monies in the hands of the receiver or receivers from the earnings of the road covered by the mortgage, which may be applicable to the discharge of the interest, and apply it to the same, and that, if the moneys thus applied is not sufficient to discharge the interest due on the first day of March, 1864, then, to ascertain the balance remaining due at that date, and in case such balance is not paid within one year from the date of the order of the Court ascertaining it, then an order shall be entered directing a sale of the mortgaged premises under the direction of the Court, and on bringing the proceeds into Court, they shall be applied to the payment of the balance of interest, and if they exceed such balance, shall be applied to the future accruing interest, down to the sale, and if they exceed that, to the principal of the bonds, in case the bond-holders assent, or pro rata to those who may assent, and any remaining balance of the proceeds to be invested under the direction of the Court, for the payment of future accruing interest, and ultimately the principal. And further, that in case the interest upon the bonds is paid without a sale, the decree shall remain as security for subsequent accruing interest, and ultimately for the principal. And further, that the Court may pay out of the monies in the hands of the receiver, or out of the proceeds, the taxed costs of the trustees in the proceedings for the foreclosure of the mortgage, not taxed and received from the defendants in these proceedings. And also, such counsel fees in behalf of the trustees, as the Court, in its discretion, may seem right to allow. 23d Feb.

You therefore are hereby commanded that such execution and further proceedings be had in said cause, in conformity to the opinion and decree of this Court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Hon. Roger B. Taney, Chief Justice of said Supreme Court, the first Monday of December in the year of our Lord one thousand eight hundred and sixty-three.

Costs of complainant:

Clerk, $241 71.
Attorney, 20 00.

$261 71. Taxed by

D. W. MIDDLETON,

*Clerk of the Supreme Court of the United States.*

*Exhibit No. 3.*

# CIRCUIT COURT, UNITED STATES.

APRIL TERM, 1864.

Charles Howard, Assignee, &c., vs the La Crosse and Milwaukee Railroad Company, and others.

James T. Soutter, surviving Trustee, &c., vs. The La Crosse and Milwaukee Railroad Company, Selah Chamberlain, the Milwaukee and Minnesota Railroad Company, and others.

Opinion by Justice SAMUEL F. MILLER.

The first suit above mentioned, is a proceeding in Chancery, instituted in the District Court of the United States for this District, while it possessed Circuit Court powers, to enforce a judgment lien on the Road of the La Crosse & Milwaukee Railroad Company. It was commenced in 1860, and a Receiver was appointed who took charge of the whole road, and all its appurtenances, on the 11th day of June of that year. Prior to this, on the 9th day of December, 1859, the plaintiffs in the second suit, who were trustees to a mortgage to secure $1,900,000 covering the eastern end of the road from Milwaukee to Portage, had brought their suit in the same Court to foreclose their mortgage; and on their motion the same person was appointed Receiver of this part of the road (on the 6th day of July, 1860,) who had been previously appointed Receiver of the whole road in the Howard suit. The amount of Howard's judgment is about $20,000, and is conceded to be subordinate in its lien to the mortgage of Bronson & Soutter. The District Court rendered a decree in favor of Bronson & Soutter for half the amount of the debt secured by their mortgage, and ordered a sale and foreclosure. From this decree they appealed to the Supreme Court, which at its recent term, reversed that decree and held that the plaintiffs were entitled to the full amount of the bonds secured by the mortgage, with the accruing interest. The mandate of the Supreme Court which is now before us in the Circuit Court, directs us to ascertain the amount of interest due on these bonds, on the first day of March last, after deducting such sums as may be in the hands of the Receiver applicable to that purpose; and that if that sum with the accruing interest and costs, is not paid within twelve months from the date of the order ascertaining the amount, then the road is to be sold. The Milwaukee & Minnesota Railroad Company now comes forward and proposes to pay this sum within a short time to be fixed by the Court, say twenty or thirty days, and asks that an order be made, that upon such payment the Receiver be discharged, and directed

to deliver to said Company the Railroad from Milwaukee to Portage, with the rolling stock and other appurtenances properly belonging to it; and asks that a similar order be made in the Howard suit.

The granting of this order is resisted by the plaintiffs, in the Bronson & Soutter foreclosure suit, by the plaintiff in the Howard suit, by Selah Chamberlain, and by a party describing itself as the Milwaukee & St. Paul Railway Company.

It is very obvious that if the plaintiffs are paid all that is due them on their mortgage, the order appointing a Receiver in the suit should be discharged, unless some very stringent reason exists for its continuance; and in that event it becomes the duty of the Court to inquire what it will do with a road thus left on its hands, with no further right to hold it, except that arising from the claim of Howard, which will be noticed hereafter.

1. The first inquiry in this view of the case is, as to the claim of the Milwaukee & Minnesota Railroad Company. They are the real owners of the road of which they now ask possession, and in them is vested the legal title thereof.

The La Crosse & Milwaukee Railroad Company, which built the Road, and which gave the mortgage to Bronson and Soutter, afterwards made a mortgage to William Barnes. This mortgage was foreclosed by a proceeding prescribed by the statutes of Wisconsin, and the purchasers at the sale, organized themselves under the laws of Wisconsin, into the corporation now setting up this claim. By virtue of that sale and foreclosure, this company became the successors in interest of the La Crosse and Milwaukee Railroad Company, and the owners and holders of the legal title to its road, appurtenances, and franchises.

An attempt is made on this motion, to question the regularity and the fairness of those proceedings, but this cannot be admitted for two reasons:

*First*, This corporation was made a defendant to the foreclosure suit by plaintiffs, and has been recognized by them, and by this court, and by the Supreme Court of the United States, as an existing corporation, and it is certainly too late in the day for any purpose of this suit to question its legal existence on a motion of this kind.

*Second*, The Supreme Court of the United States in this case, in which we are now considering its mandate, has passed upon the very question, and has decided that the Milwaukee and Minnesota Railroad Company has become the owner of said road, and that by virtue of the foreclosure proceedings under the Barnes mortgage, all leans subsequent in date to that mortgage, including the claim of Howard, were cut off and forever barred. The language of the Supreme Court, is this: "Now it appears that each of these judgments were recovered after the date of the mortgage of the La Crosse and Milwaukee Company, upon the foreclosure of which, the Milwaukee & Minnesota Company was formed. The liens of these judgments were cut off by its foreclosure; indeed the judgment of Howard of Nov., 1858, and the last judgment of Graham and Scott, which was recovered in 1860, never were liens upon any interest in the road of the La Crosse & Milwaukee Railroad Company, the defendants in the judgments, as the equity of redemption had already passed to the purchaser under the sale to Barnes in the foreclosure of the third mortgage, and afterwards be-

came vested in the Milwaukee and Minnesota Rail Road Company. These judgment creditors according to their answers, have no interest in the subject matter of this litigation."

This opinion was rendered in a proceeding to which all those who oppose the present motion were parties, except the Milwaukee and St. Paul Railway Company, which has acquired any interest it may have in the property now under consideration *pendente lite*. In the case of Russell vs. Ely, 2d Black's R. 575, the Supreme Court has decided that the mortgage of real estate does not acquire the legal title to the mortgaged premises, nor the right of possession, except by the consent of the owner, and that the holder of the legal title may maintain ejectment against the mortgagee in possession. It cannot be controverted then, that the Milwaukee and Minnesota Railroad Company, is the legal owner of the property to which it asks possession, so far as the parties to this suit are concerned, and in this proceeding.

II. I next proceed to examine the objections raised by each of the parties I have mentioned, to the discharge of the Receiver and to placing the road in the possession of that company.

*First*, The plaintiffs object, because, they say that the road itself, and its appurtenances, are not a sufficient security for their debt, and that during the year which is given by the Supreme Court for the payment of the arrears of interest, they should be retained in the hands of the Receiver, that the accruing revenue may be applied thereto.

The road bed on which plaintiff's mortgage is a lien, is ninety-five miles, from Milwaukee to Portage, besides the depots, Rolling Stock, and other appurtenances belonging to it. It constitutes a part of the direct line from the former city to the Mississippi River, which is one of the most valuable routes, both present and prospective, in the United States. The gross annual earnings, by the reports of the Receiver which are before us, for the past year, from this ninety-five miles, are about eight hundred thousand dollars. It is in good condition, and there is no reason to believe, that when the road is transferred from the control of a Receiver to that of the real owner, its value or its receipts will be diminished. There are two mortgages prior to that of plaintiffs, the aggregate amount of which is about twelve hundred thousand dollars, on which the interest is all paid, The mortgage of plaintiffs without interest, added to this, will make about two millions two hundred thousand dollars, which the road must be worth to secure plaintiffs. If we consider its annual gross receipts just stated, the fact that the party now asking possession, proposes to pay some $300,000 or $400,000 of the plaintiff's debt to get possession, and that the decree which we are to render, must stand as security for plaintiff's debt, on which he can have an order of sale for any instalment of interest when it becomes due, it would seem to be the merest pretence that his security requires the longer continuance of a Receiver, after that sum shall have been paid. If plaintiff gets the decree which the Supreme Court awards him for his unpaid interest, and that sum is paid him, and there remains to him ample security for the remainder of his debt, with speedy and sure means of enforcing its payment, there can be no reason why he should longer keep the property from the control of its owner.

*Second*, With regard to Howard, I have already shown that the Supreme Court has decided that he has no further interest in the property.

It is said that opinion was delivered under a mistake of fact. Perhaps it was so, and perhaps in a proper proceeding in his case, it may be found that he has a valid subsisting lien, but on this motion, I must consider the presumption to be the other way, and act accordingly. But suppose it was conceded that his lien was valid; it amounted, when his suit was brought, to less than $16,000, and shall this road with its eight hundred thousand dollars per annum receipts, be kept in a Receiver's hands for this $20,000, when the Courts are all open to him for the prosecution of his claim in the ordinary mode? Is there no means of enforcing a lien or collecting a debt but through a Receiver? He has had his Receiver now for four years, and has received but one thousand dollars, and has taken no steps in his cause since the order appointing the Receiver. It surely cannot be necessary to argue against a proposition to continue a Receiver under such circumstances, when no other object is to be attained, than the payment of this debt, the lien of which on the property is extremely doubtful.

III. Mr. Chamberlain objects, that he has a lien of over $700,000 on the road by judgment, and that he was in possession under a lease which gave him that possession as security for his debt, when the order appointing a Receiver was made, which took it from him. If these facts were true, and his lease were unimpeached, or his debt conceded to be just, I should have no hesitation on discharging the Receiver, to replace the property where the Court found it on making the appointment, and as the matter is now presented to me, I have also no hesitation in saying that Mr. Chamberlain's objection to the discharge of the Receiver, is the only one which has deserved a moment's consideration. It is, however, not true that Mr. Chamberlain was in possession when the Receiver was appointed. The terms of his lease required him, (out of the proceeds of the road,) to keep down the interest on the mortgage of the plaintiff in this suit. This, he failed to do, and either voluntarily, or because he could not help himself, surrendered possession of the property to the plaintiff, some fourteen or fifteen days before the order appointing a Receiver in the Howard case. This fact is conceded by all parties, and is distinctly proved by Mr. Dow in the principal suit, and shown by the accounts returned into this court in that case. So that when the Receiver was appointed in the Howard case, the property was taken by this court from the plaintiffs in this suit, and not from Mr. Chamberlain. Again, it is urged that by the failure of Mr. Chamberlain to keep down the interest on the mortgages, and by his parting with the possession, he has abandoned his claim under that lease, and can no longer insist on the right to hold possession of the property as his security. I must confess, that upon examining that lease in the light of this conceded fact, it is by no means clear to me, that if Mr. Chamberlain should bring his action to recover possession, he would be entitled to it; the consideration or the main consideration has failed. After permitting the property to be kept from himself and its owners, now for four years, and subjected to all the hazards of sale and loss, it would seem that his right to its possession must have terminated at all events.

But I cannot shut my eyes to the fact, in an application like this, addressed in some sense to the discretion of the Court, that Mr. Chamberlain's judgment, which was for the debt secured by the lease, stands upon

a very doubtful basis as to its validity and justice. It is certainly true that a decree has been obtained against him, which is in full force and unreversed, setting aside and vacating that judgment.

And although I do not purpose here to determine whether that decree can be used by the La Crosse & Milwaukee Company, or by its successors, the Milwaukee and Minnesota Company, yet it certainly must have a persuasive influence in determining whether a Receiver should be continued for the benefit of that judgment, or whether if he is discharged, the possession should be remitted to Mr. Chamberlain.

When I add to these considerations the fact that there is, in my opinion, sufficient security for any lien Mr. Chamberlain may have on the road, that the Courts are open to him to enforce that lien, and that although a party to all the suits concerning this road, he has never thus far, either by original or Cross Bill, set up a claim to any relief, I do not think his objections are sufficient to induce us to continue the Receiver, or that he is entitled to the possession of the property on the Receiver being discharged.

IV. The Milwaukee & St. Paul Railway Company is an organization created since this litigation commenced. It is no party to either of the suits named. It has no shadow of right to the property in question, yet the personal interests of its corporators are obvious. Owning the Western end of the La Crosse & Milwaukee Railroad from Portage to La Crosse, 105 miles, and organized for the purpose of operating a road, as its name imports, from Milwaukee to St. Paul, the ownership and control of the Eastern end, is indispensable to their purpose. They say in their answer to the petition of the Milwaukee and Minnesota Company, that their corporation and its directors, own eight hundred and twenty-four of the bonds secured by the Bronson and Soutter mortgage. They came before the District Court in June last, and procured an order that the Receiver should deliver to them the Eastern end of the road, and all its appurtenances, and they have used them from that day to this as they pleased.

The Supreme Court declared the proceeding of the District Court to have been without jurisdiction, and the order a usurpation of authority, yet they come forward now, and insist upon being continued in the possession thus legally acquired.

I say they have no shadow of legal claim to the possession of this property. The pretense that in buying the Western end of the road under a mortgage foreclosure, they also bought the franchises of the Eastern end, including the right to run it exclusively, and leaving to the owners of the Eastern end, and its prior mortgagees, no other right than to receive from them a rent for such use, does not deserve a moment's serious consideration, and will receive from me no other attempt at refutation, than the bare statement of the proposition.

But while their legal rights are thus weak, their interest in the matter is of the strongest character. The necessities of their situation require that they should own the Eastern end of the road, to complete their line from Milwaukee to St. Paul. They own nearly all the bonds secured by the mortgage to Bronson and Soutter.

Although the Supreme Court has declared that the Milwaukee & Minnesota Company *own* the Eastern Division, the exigencies of the Milwaukee & St. Paul Company require that *they* should own it.

It is from this source that springs all the fierce opposition to the discharge of the Receiver, and to placing the property in the hands of its owners.

The Supreme Court pursued the extraordinary course of taking from the Circuit Court, the discretionary power of limiting the time usually given in foreclosure decrees to pay the money. It also decided that the time in which the payment might be made should be twelve months, instead of ninety days, which is the most usual period. And this was done in a case where the plaintiffs had already been four years prosecuting their suit. The reason for this extraordinary course is obvious. It was to enable the Milwaukee & Minnesota Company, which that Court declared to be the owner of the road, to redeem what they considered an immensely valuable property. But this just and benevolent design of the Court, is to be defeated by keeping the control of the road in the hands of those whose interests require it to be sacrificed and sold, that they may buy it in.

The owners of the road here proffer to pay every dollar that is due on it, which is uncontroverted, prior to their own claim, and are ready to litigate disputed claims if they can get possession; yet for the benefit of those who have no claim, whose interests require them to have their neighbors property right or wrong, we are to refuse possession of this valuable property to its true owners, and continue it in the hands of those who will favor this sacrifice.

I do not trust myself to any expression of the feelings such a course must naturally generate in the bosom of any honest Judge, but content myself with placing on the record of this Court, *my solemn protest*, and my regret at my utter inability to prevent it.

*Exhibit No. 4*

# U. S. CIRCUIT COURT, APRIL TERM, 1864.

GREENE C. BRONSON and JAMES T. SOUTTER vs. the LA CROSSE & MILWAUKEE RAILROAD COMPANY, SELAH CHAMBERLAIN and others.

## OPINION BY MILLER, DISTRICT JUDGE.

A petition is presented to this Court in behalf of the Milwaukee & Minnesota Railroad Company, praying an order to put said Company into possession of the Eastern Division of the La Crosse and Milwaukee Railroad, covered by the mortgage to complainants, upon paying the amount of interest due. The interest is not paid nor tendered by the Company.

Selah Chamberlain was in possession of the Railroad under a lease from the La Crosse & Milwaukee Company, when the mortgage was made by said Company to Barnes as Trustee, under which the Milwaukee and Minnesota Company claims title; and he was removed from such possession, by these complainants under their mortgage, or by proceedings under this bill, or the bill of Sebra Howard, but it is not important at this time, under which.

Chamberlain and the Minnesota Company were made defendants in this bill as incumbrancers or owners. Chamberlain answered, setting up his lease, and also his judgment against the La Crosse Company for over six hundred thousand dollars, and claiming to be paid out of the proceeds of sale of the mortgaged premises. The Minnesota Company did not answer the bill, but let it be taken as confessed.

The District Court, on the petition of John S. Rockwell, and A. Fleming, stockholders of the Minnesota Company, charging said Company with fraud of their interests, for not appearing and answering the bill in this case; and praying leave to answer in the name of the Minnesota Company, allowed them to file such answers, from a desire to discharge a faithful duty to all parties, and to extend to them the privilege of a full hearing. Those answers made the principal defence, in which the amount claimed by the bill was reduced one half.

The Minnesota Company was organized in pursuance of a sale *in pais* to foreclose the Barnes mortgage. Its title is the same in law, as if the La Crosse Company had conveyed to it, subject to prior incumbrances, during the pendency of this bill. It is only entitled to possession as purchaser of the equity of redemption, subject to prior incumbrances. It acquired no right by a decree or judgment of a Court. Has it any more right to possession than the La Crosse Company would have? Chamberlain claims the right to contest the title of the Minnesota Company, and that Company has a right to contest Chamberlain's lien.

These matters should be adjudicated upon pleadings and proofs admitting an appeal. On this petition there is neither an appeal nor a certificate of division of opinion, to the Supreme Court. The Minnesota Company contested the consideration of Chamberlain's lien as set up by his answer, and took testimony for several months before the Masters appointed in this case who reported about four hundred thousand dollars in his favor. To enable the District Court to decide this contest, between these two defandants, according to equity practice, the Minnesota Company were allowed to file a bill against Chamberlain for that purpose; which bill I understand has been discontinued. Unless in a clear case, the Court cannot put into possession a purchaser *in pais* of an equity of redemption subject to prior incumbrances disputing the legality of the purchase.

The bill in the case of Newcomb Cleveland against the La Crosse and Milwaukee Railroad Company and others, was in aid of an execution levied to remove the incumbrance of Chamberlain's lease and judgment. Whether the decree annulling said lease and mortgage was strictly correct or not, it was responsive to the prayer of the bill and had relation to the bill. It should not, I think, have a greater effect than the bill prayed for; that is to remove the incumbrance from the way of the execution levied. But, I think, the Company cannot on this petition preclude Chamberlain from setting up his lease and judgment. He has a right to have his claim tried in an adverse suit, between himself and the Minnesota Company, either before the sale of the mortgaged property, or for the surplus after the sale. Thus far, for this purpose, every opportunity has been given by the District Court, to this Company and its stockholders. We cannot judicially decide on this petition for possession that Chamberlain forfeited his lease. The Supreme Court did not pass upon Chamberlain's claim, in its opinion in this case.

The first appointment of a Receiver was made on a judgment creditor's bill of Sebra Howard against the La Crosse Company. The same Receiver was subsequently appointed in the case of these complainants. The mortgage of complainants being prior in date to Howard's judgment, the orders made from time to time were made in this case. The Receiver's monthly reports are filed in both cases. Howard's judgment in the District Court was founded on the judgment record from the Circuit Court of Milwaukee County—whereby it appears that the judgment in that Court was rendered on the first day of May, 1858, for a sum exceeding twenty-five thousand dollars. The judgment in the State Court was prior to the mortgage to Barnes. The judgment in the District Court was subsequent. The Supreme Court in passing on the judgments against the La Crosse Company as liens considered the Howard judgment subsequent in lien to the Barnes mortgage, from an imperfect statement of the judgments in the record before them. They did not pass on the question whether the lien of the Howard judgment should exist from the date of the judgment in the State Courts, or the District Court.

As I understand it, the record before them, not containing the evidence of the foundation of the judgment in the District Court, that question remains open. Suits on judgment, I think, do not extinguish their liens. They were the common law manner of reviving judgments. The revival whether by action or *scire facias*, has relation to the original judgment. Under an execution issued on the judgment in the State

Court, property was sold to the amount of about eleven thousand dollars: but no sale being allowed under an execution on a judgment at law, of a railroad and its appurtenances, the remedy in the Howard judgment was by a judgment creditor's bill. And Howard is entitled to retain that bill and continue the Receiver, until the property of the judgment debtor is exhausted by legal proceedings, or the judgment is paid. If the Minnesota Company choose, they can by answer contest the lien of the judgment, if they are a party defendant: and if not, the Court will permit them to become a party and make the defense. Howard is not now here in a position to meet this question on the petition for possession.

We cannot know judicially that the property described in the mortgage of the complainants, subject to prior mortgages to a large amount, is an adequate security for the accrued and accruing interest on this debt of one million of dollars, without satisfactory evidence, and until the Receiver files his full account. The revenues for the last year appear large, but I think it will appear that necessary expenditures and disbursements leave not large balances —Until judicially satisfied from the Receiver's accounts, of the adequacy of the security, the Receiver should not be discharged, unless he has wilfully or negligently mismanaged the estate. A rule will be made upon the Receiver to file a continuous monthly account of receipts and disbursements from the time of his appointment.

I am anxious that the necessity for retaining the Receiver should not exist, for a day. I wish to have him discharged as soon as a due regard to the rights of the public and the parties will allow of it.

The first duty of the Court is to secure the interests of the public, under the grant of the charter to the La Crosse Company. The second duty is to protect the rights of the lien creditors and the parties litigant. The Receiver was appointed for these two purposes.

For this purpose the orders of the 12th of June, 1863, in this case and in the Howard case, modifying the original orders, appointing the Receiver, were made. The Milwaukee & St. Paul Company were allowed by those last orders to operate temporarily the Eastern Division of the road in connection with the Western Division, of which they were owners, for the sake of economy in operating the road, to secure the use of all the rolling stock on the whole line, and to restrain the St. Paul Company from diverting trade and travel from the Eastern Division. It was known that the St. Paul Company were about to connect their division, from Portage City to the Watertown road, and thence to Milwaukee, which might affect the Eastern Division.

The order allowing that Company to operate the Eastern Division subject to the control of the Court and the supervision of the Receiver, and under heavy bonds with adequate security, prohibited them from putting a car on their extension from Portage or on any other road east of that point. I considered it a proper duty for the public and the parties to secure the use of a continuous route, according to the charter, without interruption or deviation of trade or travel, between the termini of the road.

There is a disposition not to discriminate between these orders, for the temporary and conditional operation of the road by the St. Paul Company, and an order for the absolute and adverse possession of the Minnesota Company.

The order of the twelfth of June in the Howard case was made in the

Circuit Court where the bill was pending; and in this case in the District Court. The order of the District Court in this case was made under the universal belief, that, according to the opinion of the Supreme Court, the record remained in the District Court, for its proceedings, as a final decree, under the act of March 3d, 1863. The Supreme Court having since announced, that the record should have been transferred to the Circuit Court under the Act of July 15, 1862, the order of the District Court is to be considered of no validity; and it is my duty to order it rescinded. For the reasons here given the orders of the 12th of June, 1863, will be rescinded, and the Eastern Division and appurtenances restored to the Receiver, under his original appointment.

## *Exhibit No. 5.*

*Statement of the Earnings and Expenditures of the Eastern Division of the La Crosse & Milwaukee Railroad, from June 13th, 1863, to June 30th, 1864, inclusive.*

| | | | | |
|---|---|---|---|---|
| Exhibit E. Aug. 22, 1864. | H. L. P. | Gross Earnings | $960,616 80 | |
| | | For use of Rolling Stock | 18,981 96 | |
| | | | | $979,598 76 |

| | EXPENDITURES. | | |
|---|---|---|---|
| 1 | Repairs Track | $109,528 47 | |
| 2 | " Bridges | 7,018 10 | |
| 3 | " Fences | 585 45 | |
| 4 | " Buildings | 9,931 07 | |
| 5 | " Locomotives | 8,433 79 | |
| 6 | " Cars | 19,990 20 | |
| 7 | " Tools, &c | 6,978 03 | |
| 8 | Management and Gen'l Off | 11,680 66 | |
| 9 | Foreign Agencies | 8,336 41 | |
| 10 | Station Service | 48,001 66 | |
| 11 | Printing and Advertising | 5,474 14 | |
| 12 | Conductors B. & B | 29,862 82 | |
| 13 | Train and Station Supplies | 6,828 50 | |
| 14 | Engineers, F. and Wipers | 45,625 96 | |
| 15 | Oil and Waste | 15,158 81 | |
| 16 | Fuel | 37,989 74 | |
| 17 | Loss and Damage | 894 79 | |
| 18 | Personal Injuries | 373 21 | |
| 19 | Car Service | 3,935 25 | |
| 20 | Miscellaneous | 1,546 63 | |
| 21 | Telegraph | 431 37 | |
| 22 | Pass. Earnings Refunded | 1,365 92 | |
| 23 | Freight " " | 5,649 68 | |
| 24 | Mail " " | 96 19 | |
| 25 | Rents | 57 67 | |
| 26 | U. S. Revenue Tax | 7,310 43 | |
| 27 | Renewal of Track | 89,658 23 | |
| 28 | New Buildings | 27,497 84 | |
| 29 | Animals Killed | 864 00 | |
| 30 | Rent of Track | 40 00 | |
| 31 | Furniture | 900 16 | |
| 32 | Fencing | 638 43 | |
| 33 | State Taxes | 15,221 82 | |
| 34 | Legal Expenses | 6,390 23 | |
| 35 | New York Office | 2,007 05 | |
| 36 | Right of Way | 190 00 | |
| 37 | Purchase of Rails | 23,232 00 | |
| 38 | Milwaukee and St. Paul Railway | 109,950 82 | |
| 39 | Use of Rolling Stock | 166,192 30 | |
| 40 | | | |
| 41 | Balance to Cr., | | |
| 42 | Eastern Division | 143,750 93 | |
| | | $979,598 76 | $979,598 76 |

## *Exhibit No. 6.*

*Statement showing the Earnings and Expenditures of the La Crosse & Milwaukee Railroad, from June 11th, 1860, to June 13th, 1863, as operated by H. Crocker, Receiver, and the Payments made by him up to July 1, 1864.*

| Exhibit C, Aug. 19, 1864. } H. L. P. | Total Earnings. | Earnings Eastern Div. | Earnings West'n Div. | Local Ex. Eastern Div. | Local Ex. West'n Div. | Mileage East. Div | Mile'ge W. Div | Total Mileage. | Total Cost Mileage. |
|---|---|---|---|---|---|---|---|---|---|
| | $3,167,359 92 | $2,130,748 23 | $1,036,611 69 | $412,373 34 | $299,683 49 | 1,006,831 | 739,747 | 1,746,578 | $1,163,290 27 |
| **OTHER EXPENDITURES.** | | | EAST'N DIV. | | WEST'N DIV | | | | NOT DIVIDED. |
| Right af Way | | | $17,823 16 | | $13,624 29 | | | | |
| La Crosse Depot | | | | | 12,208 25 | | | | |
| Renewal of Track | | | 68,966 61 | | | | | | |
| Rolling Stock | | | | | | | | | $191,722 87 |
| Coupon 1st Mortgage | | | 339,105 07 | | | | | | |
| " Mil. City | | | 112,356 32 | | | | | | |
| " 2d Mortgage | | | 441 65 | | | | | | |
| Foreclosure " | | | 5,003 00 | | | | | | |
| Sinking Fund 1st Mortgage | | | 12,000 00 | | | | | | |
| Interest on Land Grant | | | | | 79,094 14 | | | | |
| Cleveland Judgment | | | | | | | | | 73,801 92 |
| Grading, Paving, &c. | | | 9,040 40 | | | | | | |
| Incumbrances | | | 37,194 84 | | 20,115 80 | | | | |
| State Taxes | | | 50,019 85 | | 22,973 88 | | | | |
| U. S. " | | | 4,577 28 | | 2,288 63 | | | | |
| Fox Lake Station Buildings | | | 587 26 | | | | | | |
| Fencing | | | 13,075 10 | | 29,236 34 | | | | |
| New Buildings | | | 10,757 88 | | 14,249 48 | | | | |
| La Crosse Elevator | | | | | 10,265 29 | | | | |
| Fire Insurance | | | 130 12 | | 4,401 18 | | | | |
| Loss and Damage | | | 1,000 00 | | | | | | |
| Legal Expenses | | | 2,065 68 | | 6,267 62 | | | | |
| Licenses on Patent Rights | | | 662 50 | | 737 50 | | | | |
| Ballasting | | | 9,177 40 | | | | | | |
| Discount and Commissions | | | 4,361 56 | | 2,364 87 | | | | |
| Mil. Station Buildings | | | 8,365 51 | | | | | | |
| Helfenstein Mortgage | | | | | 3,451 33 | | | | |
| Howard Judgment | | | | | | | | | 1,000 00 |
| W. Kinney " | | | 2,048 92 | | | | | | |
| Bridging | | | 14,934 82 | | 5,115 00 | | | | |
| Total cost of Mileage | $1,263,290 27 | | $723,691 93 | | $226,384 60 | | | | 266,524 79 |
| Proportion of Mileage | | | 670,820 01 | | 492,470 26 | | | | |
| Local Expenses | | | 412,373 34 | | 299,683 49 | | | | |
| | | | $1,806,885 28 | | $1,018,538 35 | | | | $266,524 79 |

*Exhibit No. 7.*

## RECAPITULATION.

Exhibit D. Aug. 19, 1864. } H. L. P.

| | | | | |
|---|---|---|---|---|
| TOTAL EARNINGS from June 11, 1860, to June 13, 1863.... | | | | $3,167,359 92 |
| EARNINGS EASTERN DIVISION. | | | $2,130,748 23 | |
| Local Expenses.... | $412,373 34 | | | |
| Other Expenditures | 723,691 93 | | | |
| Cost of Mileage.... | 670,820 01 | | | |
| | | $1,806,885 28 | | |
| EARNINGS WESTERN DIVISION. | | | $1,036,611 69 | |
| Local Expenditures | $299,683 49 | | | |
| Other " | 226,384 60 | | | |
| Cost of Mileage.... | 492,470 26 | | | |
| | | $1,018,538 35 | | |
| ACCOUNTS NOT DIVIDED. | | | | |
| Rolling Stock | $191,722 87 | | | |
| Cleveland Judgment | 73,801 92 | | | |
| Howard " | 1,000 00 | | | |
| | | $266,524 79 | | |
| To amount due other Railroads and Individuals | | | | 4,650 08 |
| Balance with Milwaukee and St. Paul Co | | | | 39,876 84 |
| By amount due from other Railroads and Individuals, including the amount of $43,330 79 assumed on taking possession of the Road | | 51,161 72 | | |
| Balance in the hands of H. Crocker Receiver, July 1, 1864.. | | 68,776 70 | | |
| | | $3,211,886 84 | | $3,211,886 84 |

35

97

*Exhibit No. 8.*

**U. S. CIRCUIT COURT,---District of Wisconsin.**

JAMES T. SOUTTER, Survivor, &c.,

*vs.*

THE LA CROSSE & MILWAUKEE RAILROAD CO. and others.

It is hereby stipulated and agreed by and between the parties to this cause, that the auditor may adjourn the further hearing of this cause until the 2d Monday of March, A. D. 1865, at 10 o'clock A. M., and that the auditor may make his report therein on or before the first Monday of April next, instead of making the same by the 1st Monday of March next, and that the orders of reference herein may be modified by the Court so as to conform to this stipulation, and it is further understood that exceptions to the report by any party shall stand for hearing on the first day of t e next April term of this Court.

November 14, 1864.

MATT. H. CARPENTER,
*Sol'r for certain def'ts and for all for whom he appears.*

JAMES S. BROWN,
*for Receiver.*

THOS. L. OGDEN,
*Sol. for Comp't.*

CARY & PRATT,
*for their Clients.*

*Exhibit No. 9.*

## CIRCUIT COURT OF THE UNITED STATES--District of Wisconsin

At a regular term of the Circuit Court of the United States for the District of Wisconsin, began and held according to law at the City of Milwaukee, in the District of Wisconsin, on the second Monday of September, 1864, present Hon. S. F. Miller, Circuit Judge, and Hon. A. G. Miller, District Judge, on the twenty-seventh day of September, A. D. 1864.

James T. Soutter, Survivor, &c.,

*vs.*

The La Crosse and Milwaukee Railroad Company, The Milwaukee and Minnesota Railroad Company, Selah Chamberlain, Sebre Howard, Conrad Wellaner, Edward H. Brodhead, Newcomb Cleveland, William Gemmel, Joshua Hathaway, James Wolstenholme, Edwin C. Litchfield, Ebenezer Higgins, George R. Mowry, Henry K. Eastman, Henry L. Simmonds, DeWitt C. Freeman, E. Bradford Greenlief, Frederick Lind, Sebastian Knetzger, Lawrence G. Graham, Donald D. Scott, Thomas Turton, John Sercomb, Ephraim Mariner, Avery Hill, A. V. Rudd, Franklin J. Blair, Edmund R. Persons, Philip S. Justice, Elkanah Cobb, John V. Bean, Philip Wilson, J. Howard Mitchell, Edwin Townsend, The Mercantile Bank of Hartford, Ct, August Lauthof, Charles Quentin, John H. Tesch, Byron Kilbourn, Nathaniel S. Bouton, The Juneau Bank, The Milwaukee, Watertown and Baraboo Valley Railroad Company, Cicero Comstock, George W. Chapman, Moses M. Davis, Charles Howard, and Henry Vallette.

This day this cause came on to be heard upon the bill taken as confessed against the defendants The La Crosse and Milwaukee Railroad Company, the Milwaukee and Minnesota Railroad Company, Edward H. Brodhead, Joshua Hathaway, D. C. Freeman, E. Bradford Greenleaf, Thomas Turton, John Sercomb, Avery Hill, A. V. Rudd, Franklin J. Blair, Edmund R. Persons, Edwin Townsend, Charles Quentin, John H. Tesch, Byron Kilbourn, The Juneau Bank, Cicero Comstock, George W. Chapman and Moses M. Davis, for their having failed to plead, answer or demur thereto, and upon the bill and answers of the defendants Selah Chamberlain, Sebre Howard, Lawrence G. Graham, Donald D. Scott, A. Fleming and John S. Rockwell, in the name of the Milwaukee and Minnesota Railroad Company, the Milwaukee, Watertown and Baraboo Valley Railroad Company, Edwin C. Litchfield and Ephraim Mariner, and the replications thereto and the pleadings and proof, and upon the report of the Masters herein filed, and on reading the Mandate from the Supreme Court of the United States, and on reading the report of Jerome R. Brigham, Special Master, showing the amount of interest due to the complainant on the 1st day of March, A. D. 1864, to be the sum of four hundred thousand dollars, less the sum of thirty-four thousand seven hundred and nine 95-100 dollars received by complainant, and that the said installments of interest are for forty thousand dollars each, and that the same are due and payable on the first days of March and September

in each year. And on motion of Thomas L. Ogden, Solicitor for the complainant;

It is ordered, adjudged and decreed that the sum of four hundred and five thousand, two hundred and ninety 5-100 ($405.290 05) dollars interest was due and unpaid upon the bonds described in the bill of complaint in this action, on the first day of September, A. D. 1864, and that the same now remains due and unpaid.

And it is further ordered and adjudged and decreed, that unless the said sum of four hundred and forty thousand dollars be fully paid at or before the expiration of one year from the date of this decree, that the usual order will be made for the sale of the mortgaged premises, described and set forth in the bill of complaint and in the mortgage. And it is further ordered and adjudged, that after the expiration of the said year, the complainant shall be at liberty, when further installments of interest shall be due and remain unpaid, or when the said principal sum shall become due and remain unpaid, to apply for an order for the sale of the said mortgaged premises, as directed by and in accordance with the Mandate of the Supreme Court. And it is further ordered, adjudged and decreed, that all monies in the hands of the Receiver or other persons, applicable to the payment of the interest specified in this decree, be paid on this decree so far as necessary to satisfy the amount now due or which may be due at the time of such payments. And it is further ordered, adjudged and decreed, that any of the parties to this suit, whose rights are not herein and hereby expressly determined and adjudged upon, shall be at liberty to apply to the Court at the foot of this decree, for such other or further relief as they may be entitled to, and consistent with the rules and practice of this Court, and as may be agreeable to Equity.

SAM F. MILLER,
A. G. MILLER.

*Exhibit No. 10.*

**U. S. CIRCUIT COURT, Wisconsin.**

JAMES T. SOUTTER, Surviving Trustee,

*vs.*

THE LA CROSSE AND MILWAUKEE RAILROAD CO., *et als.*

To the Judges of the Circuit Court of the United States of America for the District of Wisconsin:

I herewith submit my report as Receiver of the La Crosse and Milwaukee Railroad, showing my receipts and disbursements for the month of August, 1864.

H. CROCKER, *Rec.*

| | | |
|---|---|---|
| Balance cash July 31, 1864 | | $68,776 70 |
| *Receipts.*—Sundry accounts | | 55 00 |
| | | $68,831 70 |
| *Disbursements.*—Loss and damage account | $ 25 00 | |
| Incumbrances East Division | 3,116 00 | |
| 1st Mortgage Coupons | 116 98 | |
| Milw. City do | 17 06 | |
| Balance cash Aug. 31, 1864 | 65,556 66 | $68,831 70 |

STATE OF WISCONSIN, } ss.
MILWAUKEE COUNTY, }

Hans Crocker being duly sworn, deposeth and says, that the foregoing is a true and accurate statement of his receipts and disbursements as Receiver of the La Crosse and Milwaukee Railroad for the month of August, 1864, according to his best knowledge, information and belief.

H. CROCKER.

Subscribed and sworn before me, this
21st day of September, A. D. 1864,

W. L. HINSDALE,
*Notary Public, Mil. Co., Wis.*

*Exhibit A.*

# EXAMINATION of HANS CROCKER, RECEIVER

*Question.*—Since the 13th of June, 1863 have you been in actual possession and have you in fact operated the Eastern Division and its rolling stock, actually receiving the revenues thereof and disbursed the expenses of operating the same?

*Answer.*—From the 13th June, 1863, to May, 1864, the St. Paul Company was in possession of and operating the Eastern Division of the road under the order of the Court, since then it has been in my possession.

*Question.*—Have you since May 1, 1864, actually operated the Eastern Division and its rolling stock, and have you in fact received the revenue arising therefrom and disbursed the expenses of operating the same?

*Answer.*—Since the 1st of May, 1864 I have operated the road. There is a part of the balance of the earnings in the hands of the St. Paul Company not paid over.

*Question.*—From and after the orders of the Court of the 28th of April, 1864 requiring the St. Paul Company to deliver the possession of the Eastern Division to you, what change in fact was made as to the possession and operation of the Eastern Division?

*Answer.*—The possession of the Eastern Division was surrendered to me the same as I surrendered the road to them, it was surrendered to me by Mr. Hughes or Mr. Goodrich and I took it.

*Question.*—I do not speak of theories or constructive possession and operation, I ask for the actual, tangible, visible fact, and do you say that since May 1st, 1864, you have been operating the Eastern Division and its rolling stock?

*Answer.*—I say yes.

*Question.*—Have you actually been in receipt of the revenues of the Eastern Division since May 1st, 1864?

*Answer.*—About the 1st of May, when I took possession of the Eastern Division of the road I found that under the order of the Court and the claim of the St. Paul Company that the rolling stock of the Eastern Division would not be sufficient to operate that Division, it would have been necessary for me to open a new set of books and employ a new set of officers, had I determined to run the Eastern Division independent of the Western Division, I therefore told Mr. Goodrich I wanted him to operate the Eastern Division of the road, to run it for me; to retain the necessary officers or to consider them in my employment jointly with the St. Paul Road, and to keep the accounts the same as they had been kept by the St. Paul Company for the year previous, showing the proportion of earnings applicable to each division. I consider that arrangement the best arrangement for the Eastern Division. To have opened a new set of books would have required a large expenditure and have

taken a great deal of labor and time—at least one month before they could have been got up.

*Question.*—In making this arrangement, was Mr. Goodrich then acting on behalf of the St. Paul Railway Company, and was your arrangement really with that Company through Mr. Goodrich as its agent?

*Answer.*—Mr. Goodrich was at that time the General Manager of the Milwaukee & St. Paul Company, I made the arrangement with him as manager of the road of the St. Paul Company, but so far as he was to act with me it was made with him personally.

*Question.*—Are the earnings of the Eastern Division since May 1, 1864, received by Mr. Goodrich as your personal representative or are they received by the Milwaukee and St. Paul Railway Company.

*Answer.*—They are received as they had been received before that time by the Milwaukee and St. Paul Company, or by their receiving officers.

*Question.*—Is it true that you are actually in receipt of the revenues arising from the Eastern Division since May 1, 1864?

*Answer.*—The revenues of the Eastern Division are subject to my orders and have been since May, 1, 1864.

*Question.*—With whom have you kept your bank account as receiver since June 11, 1860?

*Answer.*—With the Wisconsin Marine & Fire Insurance Companies Bank.

*Question.*—Have you as Receiver made deposits or kept a bank account elsewhere than at that bank?

*Answer.*—From time to time I have had small deposits with the Merchants Bank in this City, mostly arising from collections made by the Merchants Bank.

*Question.*—By whom are the Conductors, Engineers and other employees engaged in the actual operation of the Eastern Division since May 1, 1864, employed and paid?

*Answer.*—They are the same men who were employed in the same capacity by the St. Paul Company when I took possession of the Road. Ever since I took possession of the road Mr. Goodrich has always employed these men, they are paid by the St. Paul Road, and a proportion charged to the Eastern Division.

*Question.*—On and after April 28th, 1864 was any change whatever made in the actual management of the Eastern Division except the method of keeping accounts, if so, what?

*Answer.*—The road was running just as it had been before, accounts kept between the two divisions, earnings and expenditures divided *pro rata.*

*Question.*—Have you since June 13, 1863, ever demanded of the St. Paul Company, the possession of the rolling stock that was on the road, when you was appointed Receiver and took possession, except the forty box cars mentioned in the Land Grant Decree, if so, when and where, and upon what officer or person of said Company did you make such demand?

*Answer.*—About the 29 or 23 of April, 1864, at the office of Cary and Pratt, in Milwaukee, I stated to Mr. Hughes, the President of the St. Paul

Company, the substance of the orders restoring the Eastern Division to me, and demanded the possession of the road and the rolling stock, I went into no particulars as to the rolling stock, wanted to get all I could. He replied, you shall have possession of the road and all the rolling stock that the Eastern Division is entitled to.

*Question.*—Have you ever made any other demand for any part of the rolling stock mentioned in the last question, except that mentioned by you in your last answer?

*Answer.*—I have had frequent conversations with Mr. Hughes since that time, in all of which he has reiterated what he said before, that the rolling stock on the road at the time I took possession of the road and a portion of the stock bought and built by me, belonging to the Western Division, the Land Grant road.

*Question.*—How much, and what rolling stock did the St. Paul Company surrender to you upon this demand?

*Answer.*—I cannot answer that without going into figures, I can ascertain and furnish it.

*Question.*—Did they surrender to you any Locomotive, if so, what is its number or description?

*Answer.*—They surrendered to me about seven Locomotives, but I cannot give the numbers.

*Question.*—State how, in what manner, and in whose presence this rolling stock was surrendered to you by the St. Paul Company. How many Locomotives, and how described by numbers or otherwise, and how many and what passenger and other cars, giving the number and description of each?

*Answer.*—It was surrendered by Mr. Goodrich in the office of the Company, no one was present but Mr. Goodrich and myself, the rolling stock was not in view, it was on the road, particular Locomotives and cars were not specified, the statement hereto annexed and marked Exhibit N. N., shows the amount of interest in rolling stock then transferred to me.

*Question.*—Was it not understood before you made this demand, that the Eastern Division and rolling stock should remain in the possession of the St. Paul Company, and be operated as you have stated, and was not the demand and the pretended surrender of possession to you merely formal?

*Answer.*—There was no such understanding at all, direct or indirect, or otherwise, and the arrangement was the best that could have been made for the Eastern Division.

*Question.*—Did you accept what took place between you and Goodrich as a delivery of possession to you?

*Answer.*—I did.

*Question.*—What day did this take place?

*Answer.*—I think it was the last day of April, 1864.

*Question.*—On what day was the arrangement made between you and the St. Paul Company, that you have stated in relation to their operating the Eastern Division?

*Answer.*—I think it was on the same day.

*Question.*—Is not the St. Paul Company operating a road in competition with the Eastern Division, from Milwaukee by way of Columbus to Portage City?

*Answer.*—They are.

*Question.*—Is not the pecuniary interests of that Company as the owner of a competing line of road, directly opposed to the interest of the Eastern Division?

*Answer.*—I suppose it is.

*Question.*—Since the completion of that Companies line of road, are not the agents and runners both at Milwaukee and La Crosse employed by the St. Paul Company, endeavoring to divert business from the Eastern Division?

*Answer.*—I know nothing of that at all.

*Question.*—Are there any runners or agents employed by you at Milwaukee or La Crosse to compete with the St. Paul Company, as to business between Milwaukee and Portage?

*Answer.*—I have none.

*Question.*—Since the completion of that Companies Line, has not the through travel and freight ceased over the Eastern Division, so far as it is in their power to produce that result?

*Answer.*—The natural tendency of passengers and traffic, would be to go on a through line, either to Milwaukee or La Crosse, and such has been the result.

*Question.*—What was the average earnings of the Eastern Division per day, for ten days before and ten days after the St. Paul Company commenced operating their competing line, as near as you can state from your knowledge and recollection?

*Answer.*—I will furnish such a statement.

EXAMINATION SUSPENDED.

September 12, 1864.

HANS CROCKER, Receiver.

DIRECT EXAMINATION RESUMED.

*Question.*—Since the completion of their road by the St. Paul Company, do trains run through from Milwaukee to La Crosse or from La Crosse to Milwaukee as they did before that time over the Eastern Divison?

*Answer.*—They do.

*Question.*—Since the completion of their road by the St. Paul Company, do not the trains that leave La Crosse for Milwaukee avoid the Eastern Division and come from Portage to Milwaukee over the St. Paul Company's Road by way of Watertown?

*Answer.*—The through trains run from La Crosse to Milwaukee by the way of Watertown, but the passengers make the connection East and West at Portage.

*Question.*—Is not the St. Paul Company now using the rolling stock on the road when you were appointed Receiver, except the 40 box cars on the Watertown Branch or Division of the road, in connection with the Western Division owned by the St. Paul Company?

*Answer.*—Substantially they are, but they furnish the Eastern Division of the road all the cars and engines necessary to do the business of the Eastern Division.

*Question.*—Can passengers now leave Milwaukee for La Crosse over the Eastern Division, and go through without change of cars?

*Answer.*—They cannot.

# In the Supreme Court of the United States of America.

OF THE DECEMBER TERM, 1864.

*Ex-parte : The Milwaukee and Minnesota Railroad Company.*

Here in Court comes the Milwaukee and Minnesota Railroad Company by Matt. H. Carpenter, its counsel, and in accordance with the prayer of the petition herewith filed, on behalf of said Company, moves the Court now here to order that a writ of *mandamus*, in due form, do at once issue from this Court, returnable to some certain day in the next term thereof, commanding the Honorable Samuel F. Miller, presiding Judge of the Circuit Court of the United States for the District of Wisconsin, and the Honorable Andrew G. Miller, Judge of the District Court of the United States for the District of Wisconsin, also a Judge of said Circuit Court, to ascertain the amount of moneys in the hands of the Receiver, or Receivers, arising from the earnings of the road covered by the mortgage to said Bronson and said Soutter, mentioned in said petition, which may be applicable to the discharge of the interest due on said mortgage, and apply it to the same; and that if the moneys thus applied be not sufficient to discharge the interest due on said mortgage at the date of the order ascertaining the same, then to ascertain the balance remaining due at that date; and in case such balance is not paid within one year from the date of the order of the said Circuit Court ascertaining it, that then an order be entered directing a sale of the mortgaged premises under the direction of said Circuit Court; and commanding the said Judges of the said Circuit Court to vacate the said order made by said Circuit Court on the 27th day of September, A. D. 1864, set forth in said petition, or, on failure thereof, to show to this Court on the return day of said writ, why the same has not been done.

And, in case the Court do not think fit to make such order, then the said Milwaukee and Minnesota Railroad Company, by its said counsel, moves the Court to grant a rule on the said Judges of said Circuit Court requiring them to show cause on some day certain in the next term of this Court, why a peremptory writ of *mandamus* should not issue, for the purpose above stated. And in support of this motion reference is made to the said petition and the exhibits thereto attached, and the records and transcripts in this Court mentioned in said petition.

MATT. H. CARPENTER,

*For the Mil. & Minn. R. R. Co.*

## In the Supreme Court of the United States of America.

*Ex parte : The Milwaukee and Minnesota Railroad Company.*

To Thomas L. Ogden, Esq., Solicitor for James T. Soutter, Survivor. Complainant, mentioned in the petition of the Milwaukee & Minnesota Railroad Company hereto attached:

Take notice that on the opening of said Supreme Court at the Capitol in Washington on the 3d day of February, A. D. 1865, or as soon thereafter as counsel can be heard. The Milwaukee and Minnesota Railroad Company by its counsel will upon its petition, move said Court for writ of *mandamus* or rule to show cause as per petition and motion copies of which are hereto attached, and herewith served upon you.

Dated, December 31st, 1864.

MATT H. CARPENTER,

*For the Mil. & Minn. R. R. Co.*

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# Supreme Court of the United States.

No. 3, Original Docket, December Term, 1864.

ALEXANDER FLEMING, Ex Parte,

vs.

LA CROSSE & MILWAUKEE R. R. AND OTHERS.

MOTION FOR A MANDAMUS TO THE CIRCUIT COURT, DISTRICT OF WISCONSIN.

*Brief showing why mandamus should not be granted. Submitted by N. A. Cowdrey, amicus curia.*

## STATEMENT OF FACTS.

The Record shows that the La Crosse and Milwaukee R. R. Company mortgaged its property December 31st, 1856, to Bronson, Soutter, and Knapp, trustees, to secure the payment of $4,000,000; that Bronson, Soutter, and Knapp foreclosed said mortgage January 13, 1862, in the district court of the United States for the district of Wisconsin. (The district court at that time had circuit court powers.) That in pursuance of the decree of foreclosure, the premises were advertised for sale, and sold April 25th, 1863, which sale was confirmed by the district court May 5th, 1863. The mortgaged premises were purchased by Seymour and others, through Pratt and White, under an agreement or power of attorney given by the mortgage and other creditors for that purpose. The agreement and the certificates issued thereon contains a provision that the bonds deposited with Seymour and others, with which to purchase the premises—"so much of them as are not cancelled by the sale and purchase becomes the property of the company to be formed by said purchasers, whenever the company are prepared to issue their new securities."

The powers given in the agreement to Seymour and others are very ample and full. (Extracts are below given.)

Henry E. Weed, October 25th, 1861, employed Seymour and others, under said agreement, and deposited with them the bonds claimed by Fleming, and received therefor a negotiable receipt, entitling the bearer to receive the new securities from Seymour and others. September 26th, 1864, three years after the bonds were deposited by Weed, and about one year and a half after Seymour and others had used them in the purchase of the road, Fleming, without any demand upon or notice to Seymour and others, filed a petition in the circuit court of the United States for the district of Wisconsin, claiming to be the owner of the bonds deposited by Weed, but makes no claim to own said certificate or receipt. Under the laws of Wisconsin, the *purchasers* of railroads are authorized to form corporations.

Seymour and others, through Pratt and White, under this general law, and without any special charter, formed, as purchasers of the premises, the Milwaukee and St. Paul Railway Company, May 6, 1863, which corporation has issued securities to the amount of about $10,000,000, and acquired absolutely, by purchase and construction, 273 miles of railroad.

The premises were advertised for sale under the decree of foreclosure, from about July, 1852, to time of sale, April 25, 1863.

Congress, by act passed July 15th, 1862, established a circuit court in Wisconsin, and transferred to it certain causes from the district court. By act of March 3, 1863, they qualified and limited this transfer, so that in cases where judgment and final decree had been rendered prior to the passage of the act of July, 1862, the district court "shall have power to issue writs of execution or other final process, or to use such other powers and proceedings as may be in accordance with law, to enforce the judgments and decrees."

## ARGUMENT.

1st. Petition of Fleming shows upon its face that he is neither a bondholder in his own right or an equitable bondholder. The bonds claimed by him had been deposited for a specific purpose with Seymour and others, as trustees and attorneys, by Henry E. Weed, who had received a negotiable certificate or receipt, evidencing title to the bonds or their proceeds to be in the holder or bearer of said certificate or

receipt, and had therein remitted his title to said bonds to the new corporation to be formed. Page 38. (82 side.)

Fleming does not allege that he is the owner or bearer of said certificate or receipt.

The receipt or certificate was issued under an agreement set out at page 33, (69 side,) entitling Weed or bearer, upon its surrender to Seymour and others, to receive the bonds and shares therein specified of the Milwaukee and St. Paul Railway Company, an entirely different security from that deposited, made and issued by a distinct and different corporation.

See certificate, page 38, (side 82;) agreement, page 34, (side 71;) article 2d, subdivision 1st, and page 36, (side 77,) article 5th.

The authority given by Weed to Seymour and others was accompanied by a delivery of the bonds in question to Seymour and others, and has been fully executed by them, and was in part as follows:

"*To do any and all things which they deem for the benefit of the assentents, (i. e.* the holders of bonds deposited with them,) *as fully as they might do if personally present.*" Page 33, (side 71.)

"*They are hereby authorized, in relation to all matters, exigencies, and things not herein specifically provided for, to exercise a liberal discretion in the premises.*" Page 37, (side 79.)

In pursuance of this authority Seymour and others, through Pratt and White, have used the identical bonds claimed by Fleming in purchasing the mortgaged premises, that is the railroad, and Weed or bearer has become entitled to new bonds and shares, as set out in the receipt given, viz: in the Milwaukee and St. Paul Railway Company. Page 36, (side 77,) Article 5.

This authority to Seymour and others, as exercised and used by them, has given a large number of other persons, amounting nominally to over $4,000,000, a vested pecuniary interest in the powers as exercised in the purchase of property—organizing a new corporation which has acquired and issued securities for 273 miles of railroad, with its equipment, represented by bonds and shares to the amount of near $10,000,000.

The granting of Fleming's petition dissolves this corporation, and of course depreciates the securities thus issued immensely, and this is the probable object sought by him. He claims to have bought bonds (which claim would be denied and disproved if opportunity was given) deposited

with Seymour and others, evidently for the purpose of quarrelling with them. Out of $4,000,000 of similar bonds he does not find a single one to join with him; hence his petition is not brought "on his own behalf and on behalf of all others similarly situated;" all others are content with the management of Seymour and others, and with that of Bronson, Soutter, and Knapp, their trustees.

If Seymour and others have been unfaithful or negligent trustees or attorneys under their agreement, and have injured Fleming, he has a remedy at law, and will recover and *obtain* all damages he has sustained.

2d. If Fleming was a bondholder he could not interfere with the management of the suit by his trustees, Bronson, Soutter, and Knapp. Were it otherwise, each one of the $4,000,000 of bondholders, or any person claiming to have an interest, adverse or identical, in the trust, could intervene and render the litigation interminable. It was to obviate this that the original mortgage deed of trust was made to three trustees. He does not show upon his petition or elsewhere that he has ever requested the trustees to do or not to do anything relating to the trust or to the management of the suit.

The fair inference from the language used in his petition, p. 2, (6 side) is that his interest is adverse, if not hostile to the trust.

3d. The sale was reported to and confirmed by the proper court having jurisdiction in the case. Bronson *vs.* La Crosse, 1 Wallace, 405.

McGill & Witherow, Printers and Stereotypers, Washington, D. C.

# SUPREME COURT OF THE UNITED STATES.

*Ex-parte :* ALEXANDER FLEMING,
in the matter of
JAMES T. SOUTTER,
*Survivor, &c.*

*versus*

THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY, and others.

## Brief on motion for mandamus to vacate order nisi.

MATT. H. CARPENTER,
*Counsel for Motion.*

# SUPREME COURT OF THE UNITED STATES.

Ex-parte : ALEXANDER FLEMING,
In the matter of
JAMES T. SOUTTER and SHEPHERD KNAPP, Survivors, &c.,
*vs.*
THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY and others.

Brief on motion for mandamus to Circuit Court to vacate order *nisi* in this cause, and execute mandate.

I

The mandate of this Court to the Circuit Court in the above entitled cause, is clear and unambiguous.

"That the Court ascertain the amount of monies in the hands of the "receiver or receivers from the earnings of the road covered by the mort- "gage which may be applicable to the discharge of the interest, and ap- "ply it to the same, and that if the the money thus applied, is not suf- "ficient to discharge the interest due on the 1st day of March, 1864, "then, *to ascertain the balance* remaining due at that date, and in case "such balance is not paid *within one year from the date of the order of "the Court ascertaining it*, then an order shall be entered directing a "sale of the mortgage premises," &c.

P. 5, Exhibit No. 2, printed motion papers.
Record, No. 280, this term, p. 9.

It was said in the Court below, that the Supreme Court, gave a years time to the defendant, expecting that this balance, could be speedily ascertained; and would not otherwise have done so. This can never be known. It is not impossible that a better argument on behalf of my client, at the hearing, might have produced a different result altogether. The Court however has determined the rights of the parties, and in the mandate fixed the events from which the year shall begin to run.

"The inferior Court is bound by the decree of the Court as the law of the case; and must carry it into execution according to the mandate. *They cannot vary it*; or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal *for error apparent*; *or intermeddle with it* further than to settle so much as has been remanded." Baldwin J. Sibbald vs. U. S. 12 Pet. 488.

See also, West vs. Brashear 14 Pet. 51.

In equity, the time should not begin to run until it be ascertained how much is to be paid on redemption. The complainants had had a receiver in this cause several years, who had received millions of dollars and it was equitable, and nothing more, for this Court to adjudge that it should first be ascertained how much we ought to pay, before we should be considered in default for not paying it. At the first term of the Circuit, after the decision of this Court, the defendant offered to pay into Court *all* that was due on the mortgage including costs, expenses, and counsel fee, within some short time to be fixed by the Court, and take its property. To this the Complainant objected. Printed Motion papers p. 2.

Record No. 280, this Term p. 1.

And the Court by division of judges, refused it.

Record No. 280, p. 66.

These bond-holders would not have their money but the defendant's ruin. And after having refused their money they were in no position to ask the aid of the Circuit Court, to force a sale of the property in disregard of the clearest language of the mandate.

The Circuit Court is proceeding to ascertain the balance, according to the mandate.

See order reference. Record 280, p. 67.

Order modifying same. Printed and motion papers p. 3.

**Stipulation of parties enlarging rule.**
**Printed motion papers, p. 37.**

This reference is still pending and undetermined.

At the Sept. Term, 1864, of Circuit Court, the defendant applied for an order on the Receiver to pay over the amount admitted to be on hand, about $200,000, to apply on the interest due, according to the mandate.

See affidavit and motion, Record 280, p. 112.

See account showing balance. Printed motion papers, p. 33–4–5.

Receivers report showing amount in his hands. Motion papers, p. 40.

This, the mandate clearly required, but the Judges being divided in opoinion as to the propriety of obeying it, the motion was denied.

Record No. 280, p. 263.

At the same Term, without ascertaining the amount of money in Receiver's hands, or making any order applying the same to the interest due, and while the records of the Court showed a large sum in the hands of the Receiver, applicable to the payment of interest, the Court made an order ascertaining the amount due the complainants, and ordered that the premises should be sold unless that amount should be paid within one year from the date of said order.

Record No 280, p 261.

This order being in open violation of the mandate, should be vacated, and the Circuit Court be directed, as before directed, to ascertain the balance to be paid by the defendant, before the year within which it is to be paid shall begin to run.

II.

The application for mandamus is the proper way to bring this matter to the attention of this Court.

Perkins vs. Fourniquet, 14 How. 330.

MATT. H. CARPENTER,
*Counsel for Motion.*

# Supreme Court, United States.

## Petition of Milwaukee & Minnesota Rail Road Company,

TO HAVE TWO JUDGES ASSIGNED TO HOLD THE APRIL AND SEPTEMBER TERM, 1864, OF THE CIRCUIT COURT OF THE U. S., FOR THE DISTRICT OF WISCONSIN.

MAT. H. CARPENTER,

*For Petitioner.*

1, U. S. Statutes at large, 333; Brightly's Digest, page 125, section 18.

News Steam Print.

*To the honorable, the judges of the Supreme Court of the United States of America.*

Your petitioner the Milwaukee and Minnesota Railroad Company, a corporation existing under and by virtue of the laws of the state of Wisconsin, respectfully represents:

That the La Crosse and Milwaukee Railroad Company was a corporation created by the laws of the State of Wisconsin, and authorized to build, equip, and operate a Railroad between Milwaukee on Lake Michigan and La Crosse on the Mississippi River; and that said Company did build and equip the same. That that portion of said road lying between Milwaukee and Portage is called the Eastern Division, and that portion lying between Portage and La Crosse is called the Western Division of said road. That said Company, under authority granted by the Legislature of said State, executed to Greene C. Bronson, James T. Soutter and Shepherd Knapp, as trustees, a certain trust deed or mortgage to secure certain bonds therein mentioned, said mortgage dated the 31st day of December, 1856, conveying and mortgaging the said Western Division and the rolling stock and franchise of said Company pertaining thereto. That afterwards on the 17th of August, 1857, the said Company made, executed and delivered to Greene C. Bronson and James T. Soutter, Trustees, a certain other mortgage or deed of trust dated that day to secure certain bonds therein mentioned, to the amount of one million of dollars, conveying and mortgaging the said Eastern Division, together with the rolling stock and franchises pertaining thereto.

That afterwards, on the 21st day of June, 1858, the said Company made, executed and delivered to one William Barnes a certain other mortgage to secure certain bonds therein mentioned to the amount of two millions of dollars and by which, said company conveyed and mortgaged the entire of said Railroad and all the franchises, rolling stock and property, real, personal and mixed of said Company; and that afterwards on the 21st day of May, 1859, the said last named mortgage was duly foreclosed by the said Barnes by advertisement and sale, which sale was held on the day and year last aforesaid; and that at said sale the said Barnes, in pursuance of express Legislative enactment in that behalf, became the purchaser of said Railroad, franchises, rolling stock, and other property so sold; and immediately thereafter he the said Barnes, in pursuance of the Laws of the State of Wisconsin in that behalf, organized your petitioner under its corporate name, "The Milwaukee and Minnesota Railroad Company;" and your petitioner ever since has been and now is a body corporate under the Laws of said State; and has been and is the owner of all the said Railroad, Rolling Stock and Franchises, things in action and property of every kind and nature belonging to said La Crosse and Milwaukee Railroad Company; and that the said La

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Crosse and Milwaukee Railroad Company, did not, nor did any other party or person redeem the said Railroad, Rolling Stock, Franchise and other things so sold, and purchased by said Barnes within one year after said sale, and that thus and thereupon your petitioner became, ever since has been, and now is the absolute owner of all said Railroad, Rolling Stock, Franchises, Property and things in action, so purchased by said Barnes, subject to all legal liens and encumbrances thereon at date prior to the date of the said mortgage to said Barnes.

Your petitioner further states that, about the 1st day of December, 1859, the said Bronson, Soutter and Knapp commenced in the District Court of the United States for the District of Wisconsin, in equity, a suit in their name as complainants against your petitioner and others to foreclose the said mortgage upon the said Western Division given to them as herein before stated; and that the said Bronson and Soutter about the same time, commenced another suit in said District Court in Equity, against your petitioner and others to foreclose the said mortgage upon the said Eastern Division given to them as herein before stated; that said two suits were in all respects separate, the complainants in one not being made parties defendant to the other; and the complainants in neither of said suits claiming or asking any relief as against the complainants or mortgage sought to be foreclosed in the other.

That said two suits proceeded in said District Court to final decree of foreclosure and sale, which decrees were duly entered in said suits, respectively, on the 13th day of January, A. D. 1862. That in said Western Division suit the said Bronson, Soutter and Knapp, complainants, did not appeal from said decree, but proceeded to execute the same by a sale of the mortgaged premises in that suit, and the same were sold under said decree on the 25th day of April, 1863, and the purchasers at said sale pretended to organize as a corporation under the corporate name of the Milwaukee and St. Paul Railway Company, which sale was reported by the Marshal to the said District Court, and by the said District Court the said sale was confirmed on the 5th day of May, A. D. 1863; but the said Marshal never reported said sale to the Circuit Court of the United States for said District to which Court your petitioner claims the said Western Division suit was transferred by the act of Congress of July 15, 1862, organizing the said Circuit Court; and your petitioner claims that said sale has never been confirmed by any Court having jurisdiction and authority to confirm the same.

That the said complainants, Bronson and Soutter, in said Eastern Division suit appealed from the final decree therein to this Court, and this Court upon said appeal at the December term, 1863, reversed said final decree and remanded said suit to said Circuit Court with directions among other things, as follows: "*To ascertain the amount "of moneys in the hands of the Receiver, or Receivers*, from the earn-

"ings of the road covered by the mortgage which may be *applicable* "*to the discharge of the interest, and apply it to the same*, and that if "the moneys thus applicable is not sufficient to discharge the interest "due on the first day of March, 1864, then *to ascertain the balance* "*remaining due at that date*; and in case such balance is not paid "within one year *from the date of the order of the Court ascertaining* "*it*, then, an order shall be entered directing a sale of the mortgaged "premises under the direction of the Court."

Your petitioner further shows that at the April term of the said Circuit Court, in A. D. 1864, your petitioner applied to said court in said Eastern Division Cause for possession of the said Eastern Division of the said Railroad to which it was entitled on payment of interest due in said cause, less the amount of funds in the hands of the Receiver in said cause applicable thereto, your petitioner then and there offering to pay the same within some short time to be fixed by said court; but that the Honorable Samuel F. Miller, presiding Judge of said court, and the Honorable Andrew G. Miller, District Judge, and Judge of said court differed in opinion as to the granting the prayer of said petition; and the said Honorable Samuel F. Miller then and there filed his written opinion therein, a copy of which is hereto attached and marked Exhibit No. 1. And afterward the said Andrew G. Miller published his opinion, a copy of which is hereto attached and marked Exhibit No. 2.

Your petitioner further shows that on the 12th day of June, 1863, the said District Court made an order in said Eastern Division suit directing the Receiver to deliver possession of the said Railroad, Rolling Stock and Franchises to the said Milwaukee and St. Paul Railway Company to operate the same; and said last named company immediately thereafter in pretended pursuance of said order entered into possession of and commenced operating the same; and that after the decision of this court upon your petitioners application for a Writ of prohibition, at the last term of this court to the effect that said suit was pending in the Circuit Court and not in said District Court, and that the said order of said District Court on the 12th day of June, 1863, was *coram non judice* and void, the said Circuit Court made an order in said cause on the 28th day of April, 1864, vacating said order of the 12th June, 1863, and directing the said Milwaukee and St. Paul Railway Company to redeliver to said Receiver the said railroad, rolling stock and franchises—the mortgaged premises in said suit; but the said Milwaukee and St. Paul Railway Company have never obeyed said order of April 28, 1864, but still continue in the actual operation of said premises under a pretended arrangement with said Receiver.

Your petitioner further shows that the said Milwaukee and St. Paul railway company is a rival and competitor of your petitioner, and operates a competing line of railroad from Milwaukee to Portage

city; and that the interests of the said Milwaukee and St. Paul railway company are directly opposed to the interests of your petitioner, and that it is for the interest of the said Milwaukee and St. Paul Railway Company to injure and destroy the said Eastern Division, owned by your petitioner; and that the said Receiver in said Eastern Division suit without any authority from the court in that behalf now permits said Eastern Division, Rolling Stock and Franchises to be operated by said Milwaukee and St. Paul railway company, well knowing the unfriendly feeling and hostile interest of said company in reference to your petitioner as the owner of said mortgaged premises; as appears from an extract of the deposition of the said Receiver taken before H. L. Palmer, Esquire, an auditor appointed by said Circuit Court to examine and report upon said Receiver's accounts, a copy of which is hereto attached and marked Exhibit No. 3; and that said Milwaukee & St. Paul Railway Company admits that it now holds over one hundred and forty thousand dollars revenues arising from said Eastern Division, which ought to be in said Receivers hands, and your petitioner claims that said last named company has in its hands which should be paid over to said Receiver nearly the sum of five hundred thousand dollars; that said Receiver has never given any bond whatever in this cause and that the only bond which the said Receiver ever gave was in another cause and only for the sum of fifty thousand dollars; and your petitioner is informed and believes that the said Milwaukee and St. Paul Railway Company is insolvent and on the eve of open bankruptcy; and that said sum of money will be entirely lost to your petitioner unless the prayer of this petition shall be granted by your honors; and that all the net earnings of the Eastern Division since the 1st of May, 1864, remain in the hands of the said last named company except about twenty thousand dollars.

Your petitioner further shows that at the September term of said Circuit Court, A. D. 1864, your petitioner showing to said court that the said Milwaukee and St. Paul Railway Company admitted in its hands over one hundred and forty thousand dollars net revenues arising from the mortgaged premises in said Eastern Division suit, and the report of said Receiver on file in said cause showing the balance in his hands of about sixty thousand dollars exclusive of the said balance in the hands of the said Milwaukee and St. Paul Railway Company, making about the sum of two hundred thousand dollars in all. Your petitioner applied to said court for an order directing the said receiver to pay into court the money in his hands that the same might be applied in payment of the interest due the complainants in said cause; as your petitioner claimed the mandate from this court in said cause required said Circuit Court to do; but that the said judges of the said court differed and divided in opinion as to granting said application and thereupon and for that reason the same was denied by said Circuit Court, and the said Circuit Court at

said term and without ascertaining what balance of funds was in the said receiver's hands applicable to the payment of the interest due the complainants, and without making any order applying such balance to the payment of said interest as directed by said mandate—did make an order or decree that there was due the complainants for interest in said cause the sum of $405,290 5-100 dollars and directing that unless that sum should be paid within one year therefrom, that then and in that case the said premises should be sold.

Your petitioner further shows that the accounts of the said Receiver in the said Eastern Division suit have been referred to H. L. Palmer, Esquire, to audit and report to the April term of said Circuit Court for A. D. 1865; that one question involved in the said accounts relates to the ownership of the Rolling Stock which was on said road at the time of the decree under which said Western Division was sold, as hereinbefore stated; and that the amount so dependent upon said question will vary the balance which your petitioner claims should be in the Receiver's hands in said Eastern Division suit from two hundred and fifty thousand to five hundred thousand dollars.

Your petitioner further shows that a petition is now pending in the said Circuit Court in the said Western Division foreclosure suit on behalf of your petitioner to compel the Marshal to report said sale of said Western Division to said Circuit Court; that another petition by your petitioner is pending in said Eastern Division foreclosure suit in regard to said Rolling Stock, and as to the custody and operation thereof and for the removal of the said Receiver and for other relief necessary to your petitioner and proper to be granted; all of which said petitions with other applications and motions in said causes will be for hearing before said Circuit Court at the April term thereof, A. D. 1865; that the report of the said auditor will be before said court for confirmation at that time; and your petitioner desires at that term to pay into said court in said Eastern Division suit such sum as may be necessary when added to the amount ascertained to be in the Receiver's hands applicable thereto, to pay all the interest, costs and expenses to which the said complainants in that suit are entitled and will thereupon apply for an order to be let into possession of said mortgaged premises.

Your petitioner further shows that should the Honorable the judges of said Circuit Court again disagree as to your petitioner's entering into possession of said mortgaged premises and the same should be continued in their present management your petitioner would be ruined before the said cause could be heard on appeal in this court, and the said property would have to be sold upon encumbrances prior in time to the right of your petitioner; so that should your petitioner succeed in establishing its right to such possession upon appeal in this court, such success would come too late to save said property to your petitioner. Your petitioner shows, that the net

earnings of the Eastern Division for the month of September, 1863, were reported to the said Circuit Court, as follows:

| | |
|---|---|
| Earnings | $111,121 13 |
| Expenses | 53,399 09 |
| Net | 57,722 04 |

That the result of operating said Eastern Division for the same month in 1864, is reported to the said Circuit Court, as follows:

| | |
|---|---|
| Earnings | $51,016 79 |
| Expenses | 53,505 29 |
| Deficiency | $2,488 50 |

Your petitioner further shows that the said Eastern Division, franchises and property pertaining thereto are worth the sum of one million of dollars over and above all liens and encumbrances thereon prior to the right of your petitioner; and your petitioner is ready and willing to pay off all sums that are due upon said prior encumbrances and take and operate said property so as to keep down the accruing interest on said prior encumbrances and pay the same as they shall mature; that the principal stockholders of the Milwaukee and St. Paul Railway Company are anxious to secure a sale of said Eastern Division which shall extinguish your petitioner's right thereto; and are in all things managing and conducting said Eastern Division by collusion with the said Receiver so as to reduce as much as possible the net revenues to arise therefrom.

Your petitioner therefore prays your honors sitting in the Supreme Court of the United States, to assign two of the Justices of said Supreme Court to attend the said Circuit Court of the United States for said District of Wisconsin, at the April term thereof, A. D. 1865, and also the September term thereof for the same year, and that the said justices so assigned may attend the said circuit court at said respective terms according to the act of Congress in such case made and provided.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY.

(Its Seal.)

By A. FLEMING, *Vice-President and Agent.*

MATT. H. CARPENTER,
*Solicitor and of Counsel.*

DISTRICT OF WISCONSIN, ss: Alexander Fleming being first duly sworn, on oath says, that he is the Vice-President and agent of the above named Milwaukee and Minnesota Railroad Company and

a member of the board of Directors; that he has read and knows the contents of the foregoing petition; and that the statements therein contained are true.

A. FLEMING.

Subscribed and sworn to before me,
this 1st day of December, A. D. 1864.

JAMES McFARLIN,

*Commissioner of United States Circuit Court,*
*District of Wisconsin.*

EXHIBIT No. 1.

# CIRCUIT COURT, UNITED STATES.

CHARLES HOWARD, ASSIGNEE, &c., *vs.* THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY, and others.

JAMES T. SOUTTER, SURVIVING TRUSTEE, &c., *vs.* THE LA CROSSE AMD MILWAUKEE RAILROAD COMPANY, SELAH CHAMBERLAIN, THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, and others.

## OPINION BY JUSTICE SAMUEL F. MILLER.

The first suit above mentioned, is a proceeding in Chancery, instituted in the District Court of the United States for this District, while it possessed Circuit Court powers, to enforce a judgement lien on the Road of the La Crosse and Milwaukee Railroad Company. It was commenced in 1860, and a Receiver was appointed who took charge of the whole Road, and all its appurtenances, on the eleventh day of June of that year. Prior to this, on the 9th day of December 1859, the plaintiffs in the second suit, who were trustees in a mortgage to secure $1,000,000 covering the Eastern end of the Road from Milwaukee to Portage, had brought their suit in the same court to foreclose their mortgage; and on their motion the same person was appointed Receiver of this part of the road [on the 6th day of July, 1860,] who had been previously appointed Receiver of the whole Road in the Howard suit. The amount of Howard's judgment is about $20,000, and is conceded to be subordinate in its lien to the mortgage to Bronson & Soutter. The District Court rendered a decree in favor of Bronson & Soutter for half the amount of the debt secured by their mortgage, and ordered a sale and foreclosure. From this decree they appealed to the Supreme Court, which, at its recent term reversed that decree, and held that the plaintiffs were entitled to the full amount of the bonds secured by the mortgage, with the accruing interest. The Mandate of the Supreme Court, which is now before us in the Circuit Court, directs us to ascertain the amount of interest due on these bonds, on the first day of March last, after deducting such sums as may be in the hands of the

Receiver applicable to that purpose; and if that sum with the accruing interest and costs is not paid within twelve months from the date of the order ascertaining the amount, then the Road is to be sold. The Milwaukee and Minnesota Railroad Company now comes forward and propose to pay this sum within a short time to be fixed by the court, say twenty or thirty days, and asks that an order be made that upon such payment, the Receiver be discharged, and directed to deliver to said company the Rail Road from Milwaukee to Portage, with the rolling stock and other appurtenances properly belonging to it, and asks that a similar order be made in the Howard suit.

The granting of this order is resisted by the plaintiffs in the Bronson & Soutter foreclosure suit, by the plaintiff in the Howard suit, by Selah Chamberlain, and by a party describing itself as the Milwaukee and St. Paul Railway Company.

It is very obvious that if the plaintiffs are paid all that is due them on their mortgage, the order appointing a Receiver in this suit should be discharged, unless some very stringent reason exists for its continuance; and in that event it becomes the duty of the court to inquire what it will do with a road thus left on its hands, with no further right to hold it, except that arising from the claim of Howard, which will be noticed hereafter.

I. The first inquiry in this view of the case is, as to the claim of the Milwaukee and Minnesota Railroad Company. They are the real owners of the Road of which they now ask possession, and in them is vested the legal title thereof.

The La Crosse and Milwaukee Railroad Company, which built the Road, and which gave the mortgage to Bronson & Soutter, afterwards made a mortgage to William Barnes. This mortgage was foreclosed by a proceeding prescribed by the statutes of Wisconsin, and the purchasers at the sale organized themselves under the laws of Wisconsin, into the corporation now setting up this claim. By virtue of that sale and foreclosure, this company became the successors in interest of the La Crosse and Milwaukee Rail Road company, and the owners and holders of the legal title to its road, appurtenances and franchises.

An attempt is made on this motion to question the regularity and the fairness of those proceedings, but this cannot be admitted for two reasons:

*First*, This corporation was made a defendant to the foreclosure suit by plaintiffs, and has been recognized by them, and by this court, and by the Supreme Court of the United States, as an existing corporation, and it is certainly too late in the day for any purpose of this suit to question its legal existence on a motion of this kind.

*Second*, The Supreme Court of the United States in this case, in which we are now considering its mandate, has passed upon this very question, and has decided that the Milwaukee and Minnesota Railroad company has become the owner of said Road, and that by virtue of

the foreclosure proceedings under the Barnes mortgage, all liens subsequent in date to that mortgage, including the claim of Howard, were cut off and forever barred. The language of the Supreme Court is this: "Now it appears that each of these judgments were recovered after the date of the mortgage of the La Crosse and Milwaukee company, upon the foreclosure of which the Milwaukee and Minnesota company was formed. The liens of these judgments were cut off by its foreclosure; indeed, the judgment of Howard of November, 1858, and the last judgment of Graham & Scott, which was recovered in 1860, never were liens upon any interest in the Road of the La Crosse and Milwaukee Railroad company, the defendants in the judgments, as the equity of redemption had already passed to the purchaser under the sale to Barnes in the foreclosure of the third mortgage, and afterwards became vested in the Milwaukee and Minnesota Railroad company. These judgment creditors, according to their answers, have no interest in the subject matter of this litigation."

This opinion was rendered in a proceeding to which all those who oppose the present motion were parties, except the Milwaukee and St. Paul Railway company, which has acquired any interest it may have in the property now under consideration *pendente lite*.. In the case of Russell vs. Ely, 2d Black's R. 575, the Supreme Court has decided that the mortgagee of real estate does not acquire the legal title to the mortgaged premises, nor the right of possession except by the consent of the owner, and that the holder of the legal title may maintain ejectment against the mortgagee in possession. It cannot be controverted then, that the Milwaukee and Minnesota Railroad company is the legal owner of the property of which it asks possession, so far as the parties to this suit are concerned, and in this proceeding.

II. I next proceed to examine the objections raised by each of the parties I have mentioned, to the discharge of the Receiver and to placing the road in the possession of that company.

*First*, The plaintiffs object, because they say that the road itself and its appurtenances are not a sufficient security for their debt, and that during the year which is given by the Supreme Court for the payment of the arrears of interest, they should be retained in the hands of the Receiver, that the accruing revenue may be applied thereto.

The road bed on which plaintiff's mortgage is a lien, is 95 miles from Milwaukee to Portage, besides the depots, rolling stock, and other appurtenances belonging to it. It constitutes a part of the direct line from the former city to the Mississippi river, which is one of the most valuable routes, both present and prospective, in the United States. The gross annual earnings, by the reports of the Receiver, which are before us, for the past year, from this ninety-five miles, are about eight hundred thousand dollars. It is in good condition, and there is no reason to believe that when the road is transferred from the control of a Receiver to that of the real owner, its value or its receipts will be diminished. There are two mortgages prior to that of plaintiff's,

the aggregate amount of which is about twelve hundred thousand dollars, on which the interest is all paid. The mortgage of plaintiffs without interest, added to this, will make about two millions two hundred thousand dollars, which the road must be worth to secure plaintiffs. If we consider its annual gross receipts just stated, the fact that the party now asking possession proposes to pay some $300,000 or $400,000 of the plaintiff's debt to get possession, and that the decree which we are to render, must stand as security for plaintiff's debt, on which he can have an order of sale for any installment of interest when it becomes due, it would seem to be the merest pretense that his security requires the longer continuance of a Receiver, after that sum shall have been paid. If plaintiff gets the decree which the Supreme Court awards him for his unpaid interest, and that sum is paid him, and there remains to him ample security for the remainder of his debt, with speedy and sure means of enforcing its payment, there can be no reason why he should longer keep the property from the control of its owner.

*Second*, With regard to Howard, I have already shown that the Supreme Court has decided that he has no further interest in the property. It is said that opinion was delivered under a mistake of fact. Perhaps it was so, and perhaps in a proper proceeding in his case, it may be found that he has a valid subsisting lien, but on this motion I must consider the presumption to be the other way, and act accordingly. But suppose it was conceded that his lien was valid; it amounted, when this suit was brought, to less than $16,000, and shall this road with its eight hundred thousand dollars per annum receipts be kept in a Receiver's hands for this $20,000 when the courts are all open to him for the prosecution of his claim in the ordinary mode? Is there no means of enforcing a lien or collecting a debt but through a Receiver? He has had his Receiver now for four years, and has received but one thousand dollars, and has taken no steps in his cause since the order appointing a Receiver. It surely cannot be necessary to argue against a proposition to continue a Receiver under such circumstances, when no other object is to be attained than the payment of this debt, the lien of which on the property is extremely doubtful.

III. Mr. Chamberlain objects, that he has a lien of over $700,000 on the road by judgment, and that he was in possession under a lease which gave him that possession as security for his debt, when the order appointing a Receiver was made which took it from him. If these facts were true, and his lease were unimpeached, or his debt conceded to be just, I should have no hesitation in discharging the Receiver, to replace the property where the court found it on making the appointment, and as the matter is now presented to me, I have also no hesitation in saying that Mr. Chamberlain's objection to the discharge of the Receiver is the only one which has deserved a moment's consideration. It is, however, not true that Mr. Chamberlain was in possession when the Receiver was appointed. The terms of

his lease required him (out of the proceeds of the road) to keep down the interest on the mortgage of the plaintiff in the suit. This he failed to do, and either voluntarily, or because he could not help himself, surrendered possession of the property to the plaintiff, some fourteen or fifteen days before the order appointing a Receiver in the Howard case. This fact is conceded by all parties, and is distinctly proved by Mr. Dow in the principal suit, and shown by the accounts returned into this court in that case. So that when the Receiver was appointed in the Howard case, the property was taken by this court from the plaintiffs in this suit, and not from Mr. Chamberlain. Again, it is urged that by the failure of Mr. Chamberlain to keep down the interest on the mortgages, and by his parting with the possession, he has abandoned his claim under that lease, and can no longer insist on the right to hold possession of the property as his security. I must confes that upon examining that lease in the light of this conceded fact, it is by no means clear to me that if Mr. Chamberlain should bring his action to recover possession, he would be entitled to it; the consideration, or the main consideration, has failed. After permitting the property to be kept from himself and its owners now for four years, and subjected to all the hazards of sale and loss, it would seem that his right to its possession must have terminated at all events.

But I cannot shut my eyes to the fact, in an application like this, addressed in some sense to the discretion of the court, that Mr. Chamberlain's judgment, which was for the debt secured by the lease, stands upon a very doubtful basis as to its validity and justice. It is certainly true that a decree has been obtained against him, which is in full force and unreversed, setting aside and vacating that judgment.

And although I do no not purpose here to determine whether that decree can be used by the La Crosse and Milwaukee company, or by its successor, the Milwaukee and Minnesota company, yet it certainly must have a persuasive influence in determining whether a Receiver should be continued for the benefit of that judgment, or whether if he is discharged, the possession should be remitted to Mr. Chamberlain.

When I add to these considerations the fact that there is, in my opinion, sufficient security for any lien Mr. Chamberlain may have on the road, that the courts are open to him to enforce that lien, and that although a party to all the suits concerning this road, he has never thus far either by original or cross bill, set up a claim to any relief, I do not think his objections are sufficient to induce us to continue the Receiver, or that he is entitled to the possession of the property on the Receiver being discharged.

IV. The Milwaukee and St. Paul Railway company is an organization created since this litigation commenced. It is no party to either of the suits named. It has no shadow of right to the property

in question, yet the personal interests of its corporators are obvious. Owning the Western end of the La Crosse and Milwaukee Railroad from Portage to La Crosse, 105 miles, and organized for the purpose of operating a Road, as its name imports, from Milwaukee to St. Paul, the ownership and control of the Eastern end, is indispensable to their purpose. They say in their answer to the petition of the Milwaukee and Minnesota company, that their corporation and its directors own eight hundred and twenty-four of the bonds secured by the Bronson & Soutter mortgage. They came before the District Court in June last, and procured an order that the Receiver should deliver to them the Eastern end of the Road, and all its appurtenances, and they have used them from that day to this as they pleased.

The Supreme Court declared the proceeding of the District Court to have been without jurisdiction, and the order a usurpation of authority, yet they come forward now and insist upon being continued in the possession thus illegally acquired.

I say they have no shadow of legal claim to the possession of this property. The pretense that in buying the Western end of the road under a mortgage foreclosure, they also bought the franchises of the Eastern end, including the right to run it exclusively, and leaving to the owners of the Eastern end, and its prior mortgagees, no other right than to receive from them a rent for such use, does not deserve a moment's serious consideration, and will receive from me no other attempt at refutation than the bare statement of the proposition.

But while their legal rights are thus weak, their interest in the matter is of the strongest character. The necessities of their situation require that they should own the Eastern end of the Road, to complete their line from Milwaukee to St. Paul. They own nearly all the bonds secured by the mortgage to Bronson and Soutter.

Although the Supreme Court has declared that the Milwaukee and Minnesota company *own* the Eastern Division, the exigencies of the Milwaukee and St. Paul company require that *they* should own it.

It is from this source that springs all the fierce opposition to the discharge of the Receiver, and to placing the property into the hands of its owners.

The Supreme Court pursued the extraordinary course of taking from the Circuit Court the discretionary power of limiting the time usually given in foreclosure decrees to pay the money. It also decided that the time in which the payment might be made should be twelve months, instead of ninety days, which is the most usual period. And this was done in a case where the plaintiffs had already been four years prosecuting their suit. The reason for this extraordinary course is obvious. It was to enable the Milwaukee and Minnesota company, which that court declared to be the owner of the Road, to redeem what they considered an immensely valuable property. But this just and benevolent design of the court is to be defeated by keeping the control of the Road in the hands of those whose interests require it to be sacrificed and sold, that they may buy it in.

The owners of the Road here proffer to pay every dollar that is due on it, which is uncontroverted, prior to their own claim, and are ready to litigate disputed claims if they can get possession; yet for the benefit of those who have no claim, whose interests require them to have their neighbors property right or wrong, we are to refuse possession of this valuable property to its true owners, and continue it in the hands of those who will favor this sacrifice.

I do not trust myself to any expression of the feelings such a course must naturally generate in the bosom of any honest Judge, but content myself with placing on the record of this court, *my solemn protest*, and my regret at my utter inability to prevent it.

EXHIBIT NO. 2.

# U. S. CIRCUIT COURT, APRIL TERM 1864.

GREENE C. BRONSON and JAMES T. SUTTER vs. the LA CROSSE & MILWAUKEE RAILROAD COMPANY, SELAH CHAMBERLAIN and others.

## OPINION BY MILLER, DISTRICT JUDGE.

A petition is presented to this court in behalf of the Milwaukee & Minnesota Railroad Company, praying an order to put said company into possession of the Eastern Division of the La Crosse and Milwaukee Railroad, covered by the mortgage to complainants, upon paying the amount of interest due. The interest is not paid nor tendered by the company.

Selah Chamberlain was in possession of the Railroad under a lease from the La Crosse & Milwaukee Company, when the mortgage was made by said company to Barnes as Trustee, under which the Milwaukee and Minnesota Company claims title; and he was removed from such possession, by these complainants under their mortgage, or by proceedings under this bill, or the bill of Sebra Howard, but it is not important at this time, under which.

Chamberlain and the Minnesota Company were made defendants in this bill as incumbrancers or owners. Chamberlain answered, setting up his lease, and also his judgment against the La Crosse Company for over six hundred thousand dollars, and claiming to be paid out of the proceeds of sale of the mortgaged premises. The Minnesota Company did not answer the bill, but let it be taken as confessed.

The District Court, on the petition of John S. Rockwell, and A. Fleming, stockholders of the Minnesota Company, charging said company with fraud of their interests, for not appearing and answering the bill in this case; and praying leave to answer in the name of the Minnesota Company, allowed them to file such answers, from a desire to discharge a faithful duty to all parties, and to extend to them the privilege of a full hearing. Those answers made the principal defense, in which the amount claimed by the bill was reduced one half.

The Minnesota Company was organized in pursuance of a sale *in*

*pais* to foreclose the Barnes mortgage. Its title is the same in law, as if the La Crosse Company had conveyed to it, subject to prior incumbrances, during the pendency of this bill. It is only entitled to possession as purchaser of the equity of redemption, subject to prior incumbrances. It acquired no right by a decree or judgment of a court. Has it any more right to possession, than the La Crosse Company would have? Chamberlain claims the right to contest the title of the Minnesota Company, and that company has a right to contest Chamberlain's lien.

These matters should be adjudicated upon pleadings and proofs admitting an appeal. On this petition, there is neither an appeal nor a certificate of division of opinion, to the Supreme Court. The Minnesota Company contested the consideration of Chamberlain's lien as set up by his answer, and took testimony for several months before the Masters appointed in this case who reported about four hundred thousand dollars in his favor. To enable the District Court to decide this contest, between these two defendants, according to equity practice, the Minnesota Company were allowed to file a bill against Chamberlain for that purpose; which bill I understand has been discontinued. Unless in a clear case, the court cannot put into possession a purchaser *in pais* of an equity of redemption subject to prior incumbrances disputing the legality of the purchase.

The bill in the case of Newcomb Cleveland against the La Crosse and Milwaukee Railroad Company and others, was in aid of an execution levied to remove the incumbrance of Chamberlain's lease and judgment. Whether the decree annulling said lease and mortgage was strictly correct or not, it was responsive to the prayer of the bill and had relation to the bill. It should not, I think, have a greater effect than the bill prayed for; that is to remove the incumbrance from the way of the execution levied. But, I think, the company cannot on this petition preclude Chamberlain from setting up his lease and judgment. He has a right to have his claim tried in an adverse suit, between himself and the Minnesota Company, either before the sale of the mortgaged property, or for the surplus after the sale. Thus far, for this purpose, every opportunity has been given by the District Court, to this Company and its stockholders. We cannot judicially decide on this petition for possession that Chamberlain forfeited his lease. The Supreme Court did not pass upon Chamberlain's claim, in its opinion in this case.

The first appointment of a Receiver was made on a judgement creditor's bill of Sebra Howard against the La Crosse Company.—The same Receiver was subsequently appointed in the case of these complainants. The mortgage of complainants being prior in date to Howard's judgement, the orders made from time to time were made in this case. The Receiver's monthly reports are filled in both cases. Howard's judgement in the District Court was founded on a judgement record from the Circuit Court of Milwaukee County—whereby

it appears that the judgement in that court was rendered on the first day of May 1858, for a sum exceeding twenty-five thousand dollars. The judgement in the State Court was prior to the mortgage to Barnes. The judgement in the District Court was subsequent. The Supreme Court in passing on the judgements against the La Crosse Company as liens considered the Howard judgement subsequent in lien to the Barnes mortgage, from an imperfect statement of the judgements in the record before them. They did not pass on the question whether the lien of the Howard judgement should exist from the date of the judgement in the State Court, or the District Court.

As I understand it, the record before them, not containing the evidence of the foundation of the judgement in the District Court, that question remains open. Suits on judgement, I think, do not extinguish their liens. They were the common law manner of reviving judgements. The revival whether by action or *scire facias*, has relation to the original judgement. Under an execution issued on the judgement in the State Court, property was sold to the amount of obout eleven thousand dollars; but no sale being allowed under an execution on a judgement at law, of a railroad and its appurtenances, the remedy in the Howard judgement was by a judgement creditor's bill. And Howard is entitled to retain that bill and continue the Receiver, until the property of the judgement debtor is exhausted by legal proceedings, or the judgement is paid. If the Minnesota Company choose, they can by answer contest the lien of the judgement, if they are a party defendant; and if not, the Court will permit them to become a party and make the defense. Howard is not now here in a position to meet this question on the petition for posession.

We cannot know judicially that the property described in the mortgage of the complainants, subject to prior mortgages to a large amount, is an adequate security for the accrued and accruing interest on this debt of one million of dollars, without satisfactory evidence, and until the Receiver files his full account. The revenues for the last year appear large, but I think it will appear that necessary expenditures and disbursements leave not large balances.—Until judicially satisfied from the Receiver's accounts, of the adequacy of the security, the Receiver should not be discharged, unless he has wilfully or negligently mismanaged the estate. A rule will be made upon the Receiver to file a continuous monthly account of receipts and disbursements from the time of his appointment.

I am anxious that the necessity for retaining the Receiver should not exist, for a day. I wish to have him discharged as soon as a due regard to the rights of the public and the parties will allow of it.

The first duty of the Court is to secure the interests of the public, under the grant of the charter to the La Crosse Company. The second duty is to protect the rights of the lien creditors and the parties litigant. The Receiver was appointed for these two purposes.

For this purpose the orders of the 12th of June 1863, in this case

and in the Howard case, modifying the original orders, appointing the Receiver, were made. The Milwaukee & St. Paul Company were allowed by those last orders to operate temporarily the Eastern Division of the road in connection with the Western Division, of which they were owners, for the sake of economy in operating the road, to secure the use of all the rolling stock on the whole line, and to restrain the St. Paul Company from diverting trade and travel from the Eastern Division. It was known that the St. Paul Company were about to connect their division, from Portage City with the Watertown road, and thence to Milwaukee, which might affect the Eastern Division.

The order allowing that Company to operate the Eastern Division subject to the control of the Court and the supervision of the Receiver, and under heavy bonds with adequate security, prohibited them from putting a car on their extension from Portage or on any other road east of that point. I considered it a proper duty for the public and the parties to secure the use of a continuous route, according to the charter, without interruption or deviation of trade or travel, between the termini of the road.

There is a disposition not to discriminate between these orders, for the temporary and conditional operation of the road by the St. Paul Company, and an order for the absolute and adverse possession of the Minnesota Company.

The order of the twelfth of June in the Howaad case was made in the Circuit Court where the bill was pending; and in this case in the District Court. The order of the District Court in this case was made under the universal belief, that, according to the opinion of the Supreme Court, the record remained in the District Court, for its proceedings, as a final decree, under the act of March 3d, 1863. The Supreme Court having since announced, that the record should have been transfered to the Circuit Court under the Act of July 15, 1862, the order of the District Court is to be considered of no validity; and it is my duty to order it rescinded. For the reasons here given the orders of the 12th of June, 1863, will be rescinded, and the Eastern Division and appurtenances restored to the Receiver, under his original appointment.

EXHIBIT NO. 3.

# EXAMINATION OF HANS CROCKER, RECEIVER,

## CONTINUED.

*Question.*—Since the 13th of June, 1863 have you been in actual possession and have you in fact operated the Eastern Division and its rolling stock, actually receiving the revenues thereof and disbursed the expenses of operating the same?

*Answer.*—From the 13th June, 1863 to May 1864, the St. Paul Company was in posession of and operating the Eastern Division of the road under the order of the Court, since then it has been in my possession.

*Question.*—Have you since May 1, 1864 actually operated the Eastern Division and its rolling stock, and have you in fact received the revenue arising therefrom and disbursed the expenses of operating the same?

*Answer.*—Since the 1st of May, 1864 I have operated the road. There is a part of the balance of the earnings in the hands of the St. Paul Company not paid over.

*Question.*—From and after the orders of the Court of the 28th of April, 1864 requiring the St. Paul Company to deliver the possession of the Eastern Division to you, what change in fact was made as to the possession and operation of the Eastern Division?

*Answer.*—The possession of the Eastern Division was surrendered to me the same as I surrendered the road to them, it was surrendered to me by Mr. Hughes or Mr. Goodrich and I took it.

*Question.*—I do not speak of theories or constructive possession and operation, I ask for the actual, tangible, visible fact, and do you say that since May 1st, 1864, you have been operating the Eastern Division and its rolling stock?

*Answer.*—I say yes.

*Question.*—Have you actually been in receipt of the revenues of the Eastern Division since May 1st, 1864?

*Answer.*—About the 1st of May when I took possession of the Eastern Division of the road I found that under the order of the Court and the claim of the St. Paul Company that the rolling stock of the Eastern Division would not be sufficient to operate that Division, it would have been necessary for me to open a new set of books and employ a new set of officers, had I determined to run the Eastern

Division independent of the Western Division, I therefore told Mr. Goodrich I wanted him to operate the Eastern Division of the road, to run it for me; to retain the necessary officers or to consider them in my employment jointly with the St. Paul Road, and to keep the accounts the same as they had been kept by the St. Paul Company for the year previous, showing the proportion of earnings applicable to each division. I consider that arrangement the best arrangement for the Eastern Division. To have opened a new set of books would have required a large expenditure and have taken a great deal of labor and time—at least one month before they could have been got up.

*Question.*—In making this arrangement, was Mr. Goodrich then acting on behalf of the St. Paul Railway Company, and was your arrangement really with that Company through Mr. Goodrich as its agent?

*Answer.*—Mr. Goodrich was at that time the General Manager of the Milwaukee and St. Paul Company, I made the arrangement with him as manager of the road of the St. Paul Company, but so far as he was to act with me it was made with him personally.

*Question.*—Are the Earnings of the Eastern Division since May 1, 1864, received by Mr. Goodrich as your personal representative or are they received by the Milwaukee and St. Paul Railway Company.

*Answer.*—They are received as they had been received before that time by the Milwaukee and St. Paul Company, or by their receiving officers.

*Question.*—Is it true that you are actually in receipt of the revenues arising from the Eastern Division since May 1, 1864?

*Answer.*—The revenues of the Eastern Division are subject to my orders and have been since May 1, 1864.

*Question.*—With whom have you kept your bank account as receiver since June 11, 1860?

*Answer.*—With the Wisconsin Marine & Fire Insurance Companies Bank.

*Question.*—Have you as Receiver made deposits or kept a bank account elsewhere than at that bank?

*Answer.*—From time to time I have had small deposits with the Merchants Bank in this City, mostly arising from collections made by the Merchants Bank.

*Question.*—By whom are the Conductors, Engineers and other employees engaged in the actual operation of the Eastern Division since May 1, 1864, employed and paid?

*Answer.*—They are the same men who were employed in the same capacity by the St. Paul Company when I took possession of the Road. Ever since I took possession of the road Mr. Goodrich has always employed these men, they are paid by the St. Paul Road, and a proportion charged to the Eastern Division.

*Question.*—On and after April 28th, 1864 was any change whatever made in the actual management of the Eastern Division except the method of keeping accounts, if so, what?

*Answer.*—The road was running just as it had been before, accounts kept between the two divisions, earnings and expenditures divided *pro rata.*

*Question.*—Have you since June 13, 1863, ever demanded of the St. Paul Company the possession of the rolling stock that was on the road, when you was appointed Receiver and took possession, except the forty box cars mentioned in the Land Grant Decree, if so when and where and upon what officer or person of said Company did you make such demand?

*Answer.*—About the 29 or 23 of April, 1864 at the, office of Cary & Pratt in Milwaukee, I stated to Mr. Hughes, the President of the St. Paul Company, the substance of the orders restoring the Eastern Division to me and demanded the posession of the road and the rolling stock, I went into no particulars as to the rolling stock, wanted to get all I could. He replied, you shall have possession of the road and all the rolling stock that the Eastern Division is entitled to.

*Question.*—Have you ever made any other demand for any part of the rolling stock mentioned in the last question, except that mentioned by you in your last answer?

*Answer.*—I have had frequent conversations with Mr. Hughes since that time, in all of which he has reiterated what he said before, that the rolling stock on the road at the time I took possession of the road and a portion of the stock bought and built by me, belonging to the Western Division, the Land Grant road.

*Question.*—How much and what rolling stock did the St. Paul Company surrender to you upon this demand?

*Answer.*—I cannot answer that without going into figures, I can ascertain and furnish it.

*Question.*—Did they surrender to you any Locomotive, if so what is its number or description?

*Answer.*—They surrendered to me about seven Locomotives, but I cannot give the numbers.

*Question.*—State how, in what manner and in whose presence this rolling stock was surrendered to you by the St. Paul Company. How many locomotives and how described by numbers or otherwise and how many and what passenger and other cars, giving the number and description of each?

*Answer.*—It was surrendered by Mr. Goodrich in the office of the Company, no one was present but Mr. Goodrich and myself, the rolling stock was not in view, it was on the road, particular Locomotives and cars were not specified, the statement hereto annexed and marked Exhibit N. N. shows the amount of interest in rolling stock then transferred to me.

*Question.*—Was it not understood before you made this demand that the Eastern Division and rolling stock should remain in the possession of the St. Paul Company, and be operated as you have stated, and was not the demand and the pretended surrender of possession to you merely formal.

*Answer.*—There was no such understanding at all, direct or indirect, or otherwise, and the arrangement was the best that could have been made for the Eastern Division.

*Question.*—Did you accept what took place between you and Goodrich as a delivery of possession to you?

*Answer.*—I did.

*Question.*—What day did this take place?

*Answer.*—I think it was the last day of April, 1864.

*Question.*—On what day was the arrangement made between you and the St. Paul Company that you have stated in relation to their operating the Eastern Division.

*Answer.*—I think it was on the same day.

*Question.*—Is not the St. Paul Company operating a road in competition with the Eastern Division, from Milwaukee by way of Columbus to Portage City?

*Answer.*—They are.

*Question.*—Is not the pecuniary interests of that Company as the owner of a competing line of road directly opposed to the interest of the Eastern Division?

*Answer.*—I suppose it is.

*Question.*—Since the completion of that Companies line of road are not the agents and runners both at Milwaukee and La Crosse employed by the St. Paul Company, endeavoring to divert business from the Eastern Division.

*Answer.*—I know nothing of that at all.

*Question.*—Are there any runners or agents employed by you at Milwaukee or La Crosse to compete with the St. Paul Company as to business between Milwaukee and Portage?

*Answer.*—I have none.

*Question.*—Since the completion of that Company's Line, has not the through travel and freight ceased over the Eastern Division, so far as it is in their power to produce that result?

*Answer.*—The natural tendency of passengers and traffic would be to go on a through line either to Milwaukee or La Crosse, and such has been the result.

*Question.*—What was the average earnings of the Eastern Division per day for ten days before and ten days after the St. Paul Company commenced operating their competing line, as near as you can state from your knowledge and recollection?

*Answer.*—I will furnish such a statement.

EXAMINATION SUSPENDED.

Septen ber 12, 1864.

HANS CROCKER, Receiver.

DIRECT EXAMINATION RESUMED.

*Question.*—Since the completion of their road by the St. Paul Company, do trains run through from Milwaukee to La Crosse or from La Crosse to Milwaukee as they did before that time over the Eastern Division?

*Answer.*—They do.

*Question.*—Since the completion of their road by the St. Paul Company, do not the trains that leave La Crosse for Milwaukee, avoid the Eastern Division and come from Portage to Milwaukee over the St. Paul Company's Road by the way of Watertown?

*Answer.*—The through trains run from La Crosse to Milwaukee by the way of Watertown, but the passenger trains make the connection East and West at Portage.

*Question.*—Is not the St. Paul Company now using the Rolling Stock on the Road when you were appointed Receiver, except the 40 Box cars on the Watertown Branch or Division of the road, in connection with the Western Division owned by the St. Paul Company?

*Answer.*—Substantially they are, but they furnish the Eastern Division of the road all the cars and engines necessary to do the business of the Eastern Division.

*Question.*—Can passengers now leave Milwaukee for La Crosse over the Eastern Division, and go through without change of cars?

*Answer.*—They cannot.